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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CITY OF EL PASO,
Petitioner,
v.
PHYLLIS WOODALL, et al.,
Respondents.

On Writ Of Certiorari
To The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is land that is physically, legally, or economically unsuitable for adult businesses constitutionally "unavailable" under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), *reh'g. denied*, 475 U.S. 1132, 106 S. Ct. 1163, 90 L. Ed. 2d 205 (1986)?

2. In view of this Court's recent decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ____, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), does regulation of adult businesses through zoning ordinances continue to invoke constitutional analysis?

LIST OF PARTIES

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WILLIE CENICEROS, INDIVIDUALLY AND D/B/A SWINGER'S CINEMA

JEDJO, INC., AND SMD ENTERPRISES, INC., D/B/A THE LAMPLIGHTER AND THE RED FLAME

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THE CITY OF EL PASO

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OCTOBER TERM, 1991

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PHYLLIS WOODALL, ET AL.,
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Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Fifth Circuit, dated January 9, 1992, and April 21, 1992, respectively.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit reversing and remanding this cause for a new trial (Appendix A) is reported at 950 F.2d. 255 (5th Cir. 1992). The opinion of the United States Court of Appeals for the Fifth Circuit on Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix

B) is reported at 959 F.2d. 1305 (5th Cir. 1992). The Judgment of the United States District Court for the Western District of Texas, El Paso Division appears in Appendix C.

STATEMENT OF JURISDICTION

This case involves an action brought by Respondents, representing seven (7) adult businesses in the City of El Paso, challenging the constitutionality of the City of El Paso's zoning ordinances that regulate their location within the City of El Paso. Respondents claim that the ordinances as applied to them only, effectively deny them a reasonable opportunity to open and operate, in violation of their First Amendment rights.

On January 9, 1992, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the United States District Court sustaining the validity of the City's ordinance, and remanded the case for a new trial. (Appendix A). Petitioners timely petitioned the Court of Appeals for a panel rehearing and for rehearing *en banc*. The United States Court of Appeals for the Fifth Circuit granted a rehearing in part and denied the Suggestion For Rehearing En Banc. (Appendix B).

This Court has jurisdiction to review by Writ of Certiorari the judgment of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254(1)(1988).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution provides in full as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

City of El Paso Ordinances Nos. 6169, 8926 and 9326 are attached respectively as Appendices F, G and H.

STATEMENT OF THE CASE

A. Petitioner's Statement of Facts

Following this Court's decision in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976), the City of El Paso on February 21, 1978, adopted Ordinance No. 6169. (Appendix A). Ordinance No. 6169 regulates the location of adult businesses in the City of El Paso (i.e., adult bookstores, adult motion picture theatres, nude live entertainment clubs, as defined in the Ordinance), by restricting them to certain commercial districts, and by prohibiting their location within said commercial districts to no less than one thousand (1,000) feet from any other adult business, school, church, or any area zoned residential. Ordinance No. 6169, furthermore, provided at the time of enactment for a five year amortization period.

On February 10, 1987, following a detailed study, commissioned by the City of El Paso, on the secondary impact of adult businesses in the City of El Paso, the City of El Paso adopted Ordinance No. 8926. (Appendix B).

Ordinance No. 8926 further regulates the location of adult businesses in the City of El Paso by prohibiting their location within one thousand (1,000) feet of:

1. a church

2. a public or private elementary or secondary school

3. a nursery school, kindergarten, child care center, day nursery or day care center

4. a boundary of any residential district

5. a public park adjacent to a residential district

6. the property line of a lot devoted to any residential use

7. another adult bookstore, adult motion picture theatre or nude live entertainment club.

Ordinance No. 8926 further provides for an additional one-year amortization period over and above the five-year amortization period provided by Ordinance No. 6169.

On March 22, 1988, the City of El Paso adopted Ordinance No. 9326, (Appendix H), which amended Ordinances No. 6169 and 8926, by prohibiting adult businesses from locating within one thousand feet from a university, college, vocational or business school.

Respondents represent seven (7) adult businesses

involved in providing sexually oriented entertainment of one kind or another, or are employees of such businesses. Such adult businesses have been in existence since the adoption of Ordinance No. 6169 in 1978, and have been in operation at the same sites since then. They are all located either in the wrong commercial district, or within 1000 feet of a specified use, and are, therefore, all in violation of the City's ordinances.

In April, 1988, El Paso Police raided several adult businesses in El Paso, including Respondents, and arrested several of their employees, or issued citations to those adult businesses which were found to be in violation of the City's adult businesses ordinances.

On April 15, 1988, Respondents brought suit in state court alleging that the City's adult businesses ordinances, as applied to them, unconstitutionally restricted their freedom of expression. The suit was subsequently removed to federal district court pursuant to 28 U.S.C. §§1441 (1990) and 1446 (1977).

Prior to trial on the merits, Petitioner and Respondents stipulated that the City's ordinances in question were content-neutral time, place and manner regulations, that they served a substantial governmental interest, and that they were facially constitutional. Respondents alleged at the district court level that the ordinances, as applied to them, did not provide reasonable alternative avenues of communication.

In response to special interrogatories submitted without objection from Respondents, the jury found (1) that there were 1,165 acres of land within the City of El Paso which comply with the adult businesses ordinances in question, and which are reasonably available to adult

entertainment businesses on which to open and operate; (2) that there were 59 sites within the City of El Paso which complied with the adult businesses ordinances in all respects and which were reasonably available to adult businesses; (3) that on March 22, 1988, there were 39 adult businesses operating within the City of El Paso; and (4) that considering all of the circumstances in existence on March 22, 1988, including, but not limited to, their findings regarding the number of adult businesses in question, the acreage available, and the number of available sites, the adult business ordinances of the City of El Paso did not effectively deny Respondents a reasonable opportunity to open and operate their businesses. (Appendix D).

Following a trial on the merits, the district court on March 10, 1990, ruled as a matter of law that the challenged ordinances did not unreasonably limit alternative avenues of communication, and that, independent of the jury findings, the ordinances were constitutional as applied to Respondents, as a matter of law. (Appendix C).

Respondents appealed the judgment of the district court. On January 9, 1992, a panel of the United States Court of Appeals for the Fifth Circuit held that the district court should have instructed the jury that land cannot be found to be reasonably available if its physical, economic, or legal characteristics make it impossible for any adult business to locate there, and reversed and remanded the case for a new trial. (Appendix A). On April 21, 1992, the United States Court of Appeals for the Fifth Circuit, on Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir. 1992), withdrew its previous discussion entitled "Unavailable Land Under Renton" contained in Part A of its original opinion (950 F.2d at 258), but reiterated its conclusion that the jury should have been instructed that land with physical

characteristics rendering it unavailable for any kind of development, or legal characteristics that exclude adult businesses, may not be considered "available" for constitutional purposes under *Renton*. (Appendix B).

ARGUMENT

This case involves review of the judgment of the United States Court of Appeals for the Fifth Circuit reversing and remanding this case for a new trial on the basis that the district court's instructions to the jury did not provide sufficient guidance on the critical issue of what land is reasonably available to Respondents as reasonable alternative avenues of communication. It is respectfully submitted, that the only issue in this case, as a result of stipulations entered into by the parties, is whether the challenged ordinances allow Respondents reasonable alternative avenues of communication.

Petitioner respectfully submits that there are special and important reasons for granting this Petition, consistent with the Rules of this Court. The decision of the United States Court of Appeals for the Fifth Circuit squarely conflicts with the decision of this Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), as well as with decisions of United States Courts of Appeals in *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991), and *International Food and Beverage Systems v. Fort Lauderdale*, 794 F.2d. 1520 (11th Cir. 1986).

Petitioner further submits that this Petition should be granted for the additional reason that the United States Court of Appeals for the Fifth Circuit has decided a significant question of First Amendment jurisprudence which should be addressed by this Court in view of its recent decision in

Barnes v. Glen Theatres, Inc., 501 U.S. _____, 111 S. Ct. 2456, 115 L. Ed. 2d 504, (1991).[1]

A. Is land that is physically, legally or economically unsuitable for adult businesses constitutionally "unavailable" under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), *reh'g. denied*, 475 U.S. 1132, 106 S. Ct. 1163, 90 L. Ed. 2d 205 (1986), for purposes of determining whether reasonable alternative avenues of communication exist?

The United States Court of Appeals for the Fifth Circuit applied the wrong legal standard and misinterpreted this Court's holding in *City of Renton v. Playtime Theatres, Inc.*, *supra*, in holding that the district court erred in failing to provide the jury with sufficient guidance in resolving the crucial issue of what land could be considered as reasonably available for First Amendment purposes. In originally holding that the district court's instructions were

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1. As an additional basis, counsel for El Paso is aware that there is presently pending before this Court another Petition for Writ of Certiorari to the Supreme Court of the State of Washington in the case of *City of Tukwila v. World Wide Video, Inc.*, 816 P.2d 18 (Wash. 1991), in which the issue of availability of sites has been briefed. Counsel for El Paso is further advised that there is pending before the United States Court of Appeals for the Ninth Circuit another case involving, inter alia, the issue of what criteria should be applied in determining whether or not there are reasonable avenues of communication. *Topanga Press, Inc., v. City of Los Angeles*, United States Court of Appeals No. 91-55865. Like the City of El Paso, Tukwila and Los Angeles have argued a misapplication of *Renton*, as well as conflict among United States Courts of Appeal, pursuant to Supreme Court Rule 10.1(a)

fundamentally defective because they did not instruct the jury to disregard land that was physically, legally, or economically unsuitable for relocation purposes, the Fifth Circuit Court misinterprets *Renton*. The Court completely overlooks the record which shows that Respondents spent approximately two (2) weeks presenting evidence that land "available" under the challenged ordinances was physically, legally, or economically unsuitable.

At trial, Respondents presented evidence and argued that land should be disregarded as "available" where it has "nothing on it; has topographical or physical features which make it difficult to build on; lacks street access; entails an extraordinarily high cost of building; lacks available utilities; is landlocked; is an area of concrete retaining walls; is a United States Customs holding area; is a cotton field and has sharecropper houses; contains large industrial warehouses; consists of sand dunes, cliffs, gullies and ponding areas, including the Jesuit Drain Basin, Cooper ponding area and Pullman Drain; or, is desert land." *Woodall*, 950 F.2d at 262.

Respondents further presented evidence and argued that some of the approximately 1400 acres which El Paso contended was "available" under the ordinance suffered from certain legal impediments which rendered such land constitutionally unavailable. Respondents presented evidence, for example, that some of the land which is subject to private deed restrictions or private special contracts which proscribe adult businesses should not be considered as constitutionally available.

Respondents also presented evidence that economic or business considerations affected the availability of some land as reasonable alternatives.

In holding that the district court should have instructed the jury that land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult businesses to locate on, the Fifth Circuit Court misconstrues the entire jury instruction given by the district court and applies the wrong legal standard on the issue of whether the challenged ordinances provided for reasonable alternative avenues of communication. The instructions given by the district court, and which the Fifth Circuit Court found to be insufficient, were based verbatim on this Court's holding in *Renton*, and were as follows:

> For the purpose of determining whether acreage or sites are "reasonably available," you are instructed that adult entertainment businesses must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. Acreage and sites are *not* "unavailable" solely because they are already occupied by existing businesses, or because "practically none" of the undeveloped land is currently for sale or lease, or because in general there are no "commercially viable" adult entertainment sites within the area which complies with the ordinance. Although the First Amendment guards against the enactment of zoning ordinances which have "the effect of suppressing, or greatly restricting access to lawful speech," the First Amendment does not compel the City of El Paso to insure that adult entertainment businesses, or other kinds of speech related businesses, will be able to obtain sites at bargain prices.

Woodall v. City of El Paso, 950 F.2d 255, 257 (5th Cir. 1992).

> *On the other hand, you may consider this evidence, along with all the evidence you have heard at trial, in arriving at your verdict, that is, in answering the fact issues you will determine; but only if you conclude by a preponderance of the evidence that the evidence in this case support such findings.* (emphasis added.)

Court's Instructions, (Appendix E).

On rehearing, the Fifth Circuit withdrew its discussion entitled "Unavailable Land under Renton" contained in Part A of its original opinion, 950 F.2d at 258, and any cross reference from the remainder of that opinion back to Part II.A (*Id.* at 262), but reiterated its holding that the jury should have been instructed, in addition to the part of the charge quoted above, that land with physical characteristics that render it unavailable for any kind of development, or legal characteristics that exclude adult businesses, may not be considered "available" for constitutional purposes. *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir. 1992). (Appendix B).

The City's ordinances provide, on their face, alternative relocation sites. Adult entertainment businesses such as Respondents, are permitted by right in certain commercial zones subject only to certain distance restrictions.

There is no evidence in the record that Respondents cannot find an alternative relocation site in the City for their adult businesses. Respondents' evidence and arguments assert only that it will be difficult for them to survive. Thus, the only argument by Respondents is that even though there may be some sites where they can operate, the locations will

be difficult to obtain legally or are commercially undesirable. Even assuming that a relocation site is not legally available or economically attractive, that is not a basis for invalidating the instructions given by the district court.

In 1976, in his concurring opinion in *Young v. American Mini Theatres, Inc.*, *supra*, Justice Powell stated:

> The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage.

427 U.S. at 78, 96 S. Ct. at 2455, 49 L. Ed. 2d at 330 (Powell, J., concurring.)

In 1981, Renton, Washington, enacted an ordinance that precluded an adult motion picture theatre from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church or park, or within *one mile* of any school. This Court in 1986 adopted the district court's finding that 520 acres of the City's land was open to use as adult theater sites. "[T]he 520 acres of land consist of 'ample, accessible real estate,' including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office and shopping space that is criss-crossed by freeways, highways, and roads.'" *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 53, 106 S. Ct. at 932, 89 L. Ed. 2d at 41.

The Renton theater owners had argued in this Court that since some of the available acreage was already occupied, or because most of the undeveloped land was not currently for sale or lease, there were no "commercially viable" sites, and therefore, the ordinance substantially restricted speech. *Id.* 475 U.S. at 53-54, 106 S. Ct. at 932, 89 L. Ed. 2d at 41-42. However, in a holding that governs the resolution of the instant case, this Court stated:

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' *American Mini Theatres*, 427 US, at 71, n.35, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See id., at 78, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (POWELL, J., concurring). ('The inquiry for First Amendment purposes is not concerned with economic impact'). In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Id. 475 U.S. at 54, 106 S. Ct. at 932, 89 L. Ed. 2d at 42.[2]

In its opinion in that case, *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984), the Ninth Circuit Court of Appeals set forth the circumstances it believed demonstrated the *unavailability* of certain sites. "A substantial part of the 520 acres is occupied by: (1) a sewage disposal site and treatment plant; (2) a horseracing track and environs; (3) a business park containing buildings suitable only for industrial use; (4) a warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and (6) a fully-developed shopping center." *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d at 534.

This Court explicitly *rejected* the notion that the foregoing sites were unavailable for purposes of determining the restrictive impact of an adult business zoning ordinance.

To the extent that physical unavailability may be couched in terms of economic unsuitability as suggested by the Court of Appeals in footnote 5 of its original opinion, the Fifth Circuit Court's holding that land which is subject to certain physical impediments is not "available" for constitutional purposes is contrary not only to this Court's holding in *Renton*, but is also inconsistent with other Courts of Appeals which have ruled on the availability issue. These cases have made it clear that analysis of the availability issue is not concerned with economic impact, and that Petitioner is not required to provide bargain real estate prices or ensure economic success to adult businesses. Alternative avenues of communication exist, as clearly stated by this Court in

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2. In his concurring opinion in *Young*, Justice Powell also stated: "To be sure some prospective patrons may be inconvenienced by this dispersal." *Id.* 427 U.S. at 79, 96 S. Ct. at 2456, 49 L. Ed. 2d at 331. That possibility did not invalidate the Detroit ordinance.

Renton, as long as adult businesses are permitted to relocate on land that is accessible, whether it be physically or legally unsuitable or not, even if the land is not actually available for lease or sale in the current real estate market.

Interestingly, in a case out of the Fifth Circuit, the Court of Appeals in *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), affirmed the district court's determination that sufficient alternative sites existed for the relocation of 23 adult businesses under the distance separation requirements of a Houston ordinance. In that particular case, the plaintiffs had claimed that 40 of the relocation sites proferred by the City of Houston were physically unavailable or unsuitable for commercial uses. Reiterating the holding of this Court's opinion in *Renton*, the Fifth Circuit Court in *SDJ, Inc. v. City of Houston* held that alternative sites need not be commercially viable, and that the number of sites available on a city-wide basis was the operative and dispositive statistic for determining whether the ordinance improperly restricted speech. *Id.* at 1277.

In *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), the Court of Appeals below, after acknowledging that the *Renton* standard of review applies in analyzing the reasonable alternative avenue of communication issue, upheld the constitutionality of the Dallas ordinance. The district court opinion in that case, *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986), had found that after *Renton*, it was of no constitutional consequences that "areas left open by the ordinance are undesirable as a matter of business judgment by those in sexually oriented businesses." *Id.* at 1071, n.23.

In *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991), the Court of Appeals for the Eighth Circuit reversed the district court's holding that the ordinance in

question suppressed and greatly restricted access to protected speech. *Id.* at 280. In upholding the ordinance, the Court of Appeals held that the district court had applied the incorrect legal standard, and, the fact that plaintiffs could not secure property meeting their economic or commercial criteria, did not invalidate the ordinance under the second prong of *Renton*'s two-prong analysis. In *Alexander*, the Court of Appeals held that the City of Minneapolis was not required to provide Plaintiffs with actual sites for relocation purposes, as long as the ordinance provides for potential sites and does not deprive plaintiffs of a "reasonable opportunity to open and operate." *Id.* at 284.

In another post-*Renton* decision, *International Food and Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986), the Eleventh Circuit Court of Appeals vacated the district court's ruling enjoining the enforcement of ordinances restricting the location of adult businesses. In that case, the district court had determined that 22 available sites existed within the City of Fort Lauderdale to accommodate 10 such businesses already in existence. The Court of Appeals advised the district court that economic impact was not a standard by which to determine the constitutionality of the ordinance and noted that in *Renton*, "Justice Rehnquist does not say that the City may not limit alternative avenues of communication, but only that it may not limit such avenues unreasonably." *Id.* at 1526.

Significantly, in *International Food and Beverage Systems v. City of Fort Lauderdale*, *supra*, testimony at trial on behalf of the adult businesses focused, not unlike the evidence presented at the district court in the instant case, on the unsuitability of the 25 sites which the City of Fort Lauderdale argued were available. Although there was testimony that some of the 25 sites were "physically absurd;" for example, one in the municipal water works, and others

on isolated sites, or in prohibitive high-rent portions of the city, the Eleventh Circuit Court of Appeals upheld the ordinance, although acknowledging that the trial court had conceded that there may be only a dozen sites available, which when added to those adult businesses in existence, would have made 22 available sites "available" in a city of 31 square miles and 156,000 inhabitants. *Id.* at 1524.

In holding that the district court should have instructed the jury that land that is physically or legally not suitable was not "reasonably available" for First Amendment purposes, the Fifth Circuit Court of Appeals in this case applied the wrong legal standard and erroneously equates physical, legal, and economic unsuitability with constitutional unavailability. Petitioners would show unto this Court that the Fifth Circuit Court's approach is not only contrary to this Court's holding that "the inquiry for First Amendment purposes is not concerned with economic impact," *Young, supra*, 427 U.S. at 78, 96 S. Ct. at 2456, 49 L. Ed. 2d at 330, and that "adult, businesses must fend for themselves in the real estate market on an equal footing with other prospective purchasers and lessees," *Renton*, *supra*, 475 U.S. at 54, 106 S. Ct. at 932, 89 L. Ed. 2d at 54, but is also contrary to the analysis applied by other Courts of Appeals after *Renton*. The Fifth Circuit Court of Appeals, although attempting to distinguish the facts of the instant case from the facts presented before the district court in *Renton*, glosses over the fact that in *Renton*, the City's ordinance was upheld in spite of the fact that a substantial part of the 520 acres theoretically available to adult businesses under the Renton, Washington ordinance was physically, legally, and economically not available in reality because such acreage was occupied by, among other things, a sewage disposal site, a horse-racing track, a warehouse and manufacturing-facility, a Mobil Oil tank farm, and a full shopping center. These sites have physical characteristics similar to those

which Respondents claim make the El Paso sites not practically available.

If the opinion of the United States Court of Appeals for the Fifth Circuit survives as establishing the law in this area of First Amendment jurisprudence, the detailed site-by-site land assessment that it recommends would permit adult businesses to argue that they are entitled to litigate their capability to survive from a physical, legal, or economic standpoint. The approach of the Fifth Circuit Court of Appeals will subject adult businesses zoning ordinances to micromanagement by the federal courts. Petitioner respectfully submits that the correct approach, as stated by this Court in *Renton*, involves recognition that once a city has established a need to regulate the location of adult businesses, those businesses must fend for themselves in the real estate market, in compliance with all of the physical, legal, or economic restrictions which the real estate market may impose upon such businesses, as it does for all businesses, independent of the ordinance being challenged.

The approach suggested by the Fifth Circuit Court of Appeals would give unwarranted advantage to adult businesses in the competition for available space in the real estate market. If adult businesses such as Respondents perceive themselves to be at a disadvantage vis-a-vis other purchasers and lessees, that perception is a result of the nature of their business, and not due to El Paso's zoning ordinance, or any other government action. In the instant case, for example, the existence of long-term leases or private restrictive covenants that preclude adult businesses is a result of the market place, and is not caused by the ordinances challenged in this case.

Finally, the United States Court of Appeals for the Fifth Circuit and Respondents erroneously rely on *Basiardanes v. City of Galveston*, 682 F.2d. 1203 (5th Cir. 1982). *Basiardanes* is a pre-*Renton* decision in which the Court struck down the City of Galveston's zoning ordinance on the basis that the ordinance was neither motivated by a sufficient governmental interest, nor narrowly tailored so as to satisfy the First Amendment. *Id.* at 1215.

In the instant case, the record is clear that the jury rejected some of the sites which El Paso claimed was available under the ordinance, because they were either politically, physically, legally, or economically not suitable for adult businesses. The Fifth Circuit Court's suggestion that the jury must have been confused about what land was constitutionally available is not supported by the record. Petitioner respectfully submits that the jury considered all of the evidence presented by both Petitioners and Respondents, and that it then rejected as "reasonably available" those areas which lacked street access, entailed an extraordinary high cost of building, lacked available utilities, was land-locked, consisted of concrete retaining walls, comprised part of a United States Customs holding area, contained a cotton field and sharecropper homes, consisted of sand dunes, cliffs, gullies, ponding areas, and which suffered from other physical characteristics undesirable to adult businesses. The jury's findings that there were 20 more sites available than adult businesses in existence in 1988, and 59 more sites to which Respondents could relocate, establishes that the adult businesses zoning ordinance of the City of El Paso is not unconstitutional, as a matter of law, as applied to Respondents.

The approach of the Fifth Circuit Court of Appeals to the availability issue is squarely in conflict with this court's decisions in *Renton* and *Young*. Its approach would require

local governmental bodies interested in curbing the secondary negative impact of adult businesses to engage in a most onerous, if not impossible, task of conducting a site-by-site assessment of every possible site available under their ordinances to determine whether there are any physical or legal impediments for adult businesses to relocate there. Petitioner submits that such valid constitutional and legal private impediments, which are not created by any government action, do not give rise to constitutional rights. Such an approach would further mean that any such detailed study would more likely than not be outdated as soon as it is completed since any land available at the time the study is conducted, may not be available any time thereafter, due to changes in the real estate market.

B. In view of this Court's decision in *Barnes v. Glen Theatres, Inc.*, 501 U.S.____, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), does regulation of adult businesses through zoning ordinances continue to invoke constitutional scrutiny?

On June 21, 1991, this Court, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ____, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991), a decision having a significant impact upon the constitutional issue involved in this case, held that a statute prohibiting nude dancing in public as entertainment did not violate the First Amendment. Petitioner respectfully submits that this Court's decision in *Barnes* provides the legal basis for the proposition that the nude live entertainment provided by Respondents is no longer subject to constitutional scrutiny, and that the City of El Paso's mere regulation of those places where such activity can legally take

place, as opposed to the ban thereof, does not invoke constitutional protections because no constitutionally protected rights are involved.

Barnes involved a constitutional challenge of an Indiana statute which made it a misdemeanor to appear nude in a public place. Two establishments, together with individual dancers employed at those establishments, sought to have the statute invalidated on the grounds that the statute violated the First Amendment. *Id.* at 509-510. In that case, the district court granted an injunction, holding that the statute was facially overbroad. The United States Court of Appeals for the Seventh Circuit, reversed and remanded the case to the district court in order to determine whether the First Amendment was violated by the statute as applied to the type of dancing at issue. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986). On remand, the district court held that such dancing was not protected expressive activity, and accordingly, entered judgment in favor of the defendants. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988). A panel of the Court of Appeals, again reversing on appeal, held that the dancing at issue was expressive conducted protected by the First Amendment. *Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989). On rehearing, *en banc*, the Seventh Circuit held that the Indiana statute was an improper infringement of expressive activity and enjoined the state from enforcing the statute against the plaintiffs so as to prohibit nonobscene nude dancing as entertainment. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990).

On appeal, the Supreme Court, however, in a plurality opinion, upheld the State of Indiana's total ban on public nudity and held that such ban does not violate the First Amendment. Although conceding that nude dancing is expressive conduct within the outer perimeters of the First

Amendment, the Court, in an opinion written by Chief Justice Rehnquist and joined by Justices O'Connor and Kennedy, upheld the statute as furthering a substantial government interest in protecting order and morality, an interest unrelated to the suppression of free expression. "So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude." *Id.* at 545.

In his concurring opinion, Justice Scalia held that he would sustain the Indiana statute as a general law rationally based on moral opposition to public nudity and not specifically targeted at expressive conduct. Thus, Justice Scalia would not subject Indiana's statute to any First Amendment scrutiny. *Barnes*, 501 U.S. at ____, 111 S. Ct. at ____, 115 L. Ed. 2d at 520.

Although agreeing with the plurality opinion that nude dancing is entitled to some protection under the First Amendment, Justice Souter, in his concurring opinion, would uphold Indiana's ban on the basis of the State's substantial interest in combating the secondary effects of adult entertainment establishments. *Barnes*, 501 U.S. at ____, 111 S. Ct. at ____, 115 L. Ed. 2d at 521.

The type of conduct and entertainment which Respondents seek to continue engaging in and providing, and which invokes the application of the ordinances being challenged here is no different than the conduct involved in *Renton*, *Young*, and *Barnes*. The application of the City's ordinance to Respondents' conduct is invoked by their engaging in conduct that is of the same character as that in *Barnes*, i.e., public nudity. Therefore, Petitioner respectfully submits that if public nudity can be totally banned without violating the First Amendment, a legitimate

governmental interest which El Paso has not yet pursued, the regulation of public nudity, with respect to where it may be exhibited within the confines of the city limits of the City of El Paso, ought not invoke constitutional scrutiny.

CONCLUSION

In holding that the district court had given the jury insufficient instructions on the issue of the availability of reasonable alternative avenues of communication, the United States Court of Appeals for the Fifth Circuit has misinterpreted this Court's decisions in *Young*, *supra*, and *Renton*, *supra*, and has applied, as a matter of law, the wrong criteria for determining whether a particular zoning ordinance provides for reasonable alternative avenues of communication within the terms of this Court's two-prong analysis as set forth in *Renton*. By requiring as a matter of law that alternative avenues of communication, in the constitutional sense, be legally and physically viable, on a site-by-site approach, the Fifth Circuit Court in this case has elevated adult businesses to a preferential position in the real estate market, contrary to this Court's clear admonition that such businesses must fend for themselves in the real estate market on an equal footing with other purchasers and lessees. By focusing on physical and legal viability as criteria for determining whether alternative sites are reasonably available in the constitutional sense, the Fifth Circuit Court has in effect made it practically impossible for local governments to regulate adult businesses consistent with a standard not recognized in *Renton*.

Petitioner submits that the ramifications of *Barnes*, *supra*, for the evaluation of the sufficiency of the jury charge in this case are immense. The Indiana statute eliminated public nude dancing from the entire state. The ordinances challenged by Respondents do not prohibit outright any nude

dancing or other adult entertainment in business establishments as long as such activity takes place in designated commercial districts, and otherwise comply with the distance requirements. Presumably, after *Barnes*, it would be constitutionally permissible for El Paso to ban all public nude dancing within its city limits. After *Barnes*, therefore, El Paso's decision to merely regulate public nude dancing survives constitutional scrutiny.

For all the reasons addressed in this petition, Petitioner respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A
(Opinion, United States Fifth Circuit Court of Appeals dated January 9, 1992)

Phyllis WOODALL, et al.,
Plaintiffs-Appellants.
v.
The CITY OF EL PASO, et al.,
Defendants-Appellees.

No. 90-8269

United States Court of Appeals,
Fifth Circuit.
Jan. 9, 1992.

Adult businesses challenged constitutionality of zoning ordinance that restricted their location, claiming that the ordinance effectively denied them reasonable opportunity to open and operate. The United States District Court for the Western District of Texas, Emilio M. Garza, J., entered judgment on jury verdict for city, and businesses appealed. The Court of Appeals, Reavley, Circuit Judge, held that land cannot be found to be reasonably available as alternative site if its physical or legal characteristics make it impossible for any adult business to locate there.

Reversed and remanded.

1. **Zoning and Planning. 70**

City cannot rezone in manner that effectively denies adult businesses reasonable opportunity to open and operate businesses within city. U.S.C.A. Const. Amend. 1.

2. **Constitutional Law. 90.2**
Zoning and Planning. 21

First Amendment does not guarantee speech-related businesses right to stay in business, let alone any particular profit margin, solely by virtue of their relationship to speech; economic impact of challenged law on speech-related businesses is only significant to extent that it suppresses ability to convey and receive protected messages, and fact that operating costs under challenged ordinance would render business unprofitable does not mean that ordinance has suppressed protected messages. U.S.C.A. Const. Amend. 1.

3. **Constitutional Law. 90.4(1)**
Zoning and Planning. 76

In determining whether zoning ordinance limiting adult businesses leaves such businesses reasonable alternative avenue of communication for constitutional purposes, court should only consider alternatives which are economically suitable for such businesses; land is only economically unsuitable as reasonable alternative avenue of communication if no adult business could possibly expect to profit by opening there. U.S.C.A. Const. Amend. 1.

4. **Federal Civil Procedure. 2171, 2182**

Trial judge has wide latitude in fashioning jury instructions, and the verdict will be reversed and remanded only if charge as a whole leaves reviewing court with substantial and ineradicable doubt as to whether jury has been properly guided in its deliberations.

5. **Constitutional Law. 90.4(1)**
Zoning and Planning. 76

In determining whether zoning ordinance leaves alternative land available for adult businesses, and thus does not unconstitutionally infringe upon free speech rights of businesses, alternative property is not necessarily unavailable

merely because other business is being operated on it; if, however, other business is operated pursuant to lease that commits property for terms of years, property may be effectively unavailable to adult businesses or any other business enterprise. U.S.C.A. Const. Amend. 1.

6. **Constitutional Law. 90.4(1)**
Zoning and Planning. 76

Land cannot be found reasonably available to adult businesses, for purpose of determining whether zoning ordinance unconstitutionally infringes upon free speech rights of adult businesses, if land's physical or legal characteristics make it impossible for any adult business to locate there. U.S.C.A. Const. Amend. 1.

Appeals from the United States District Court for the Western District of Texas.

Before CLARK, Chief Judge, REAVLEY and JONES, Circuit Judges.

REAVLEY, Circuit Judge:

Appellants contend that the City of El Paso unconstitutionally abridged their speech rights under the Texas and United States constitutions by enacting excessively restrictive zoning ordinances. The district court dismissed their case in accordance with a jury's verdict that El Paso's ordinances do not effectively deny them a reasonable opportunity to open and operate their adult businesses. Because we fault the district court's instructions to the jury, we reverse the court's judgment and remand this case for further proceedings.

I. BACKGROUND

Appellants operate bars, bookstores, and movie theaters in El Paso which convey sexually-oriented, though non-obscene, expression to patrons (adult businesses). El Paso's city council enacted a series of zoning ordinances (the Ordinances) by March 1988 which prohibit these businesses from locating within 1,000 feet of churches, schools, residences, nurseries, parks, and each other. *See* El Paso, Tex., Ordinances 6169 (1978), 8926 (1987), 9326 (1988); El Paso, Tex., Code art. II § 20.08.080.A (March 1989). El Paso police began ticketing adult businesses, which were all required to relocate under the Ordinances, in April 1988. Appellants responded with this suit in which they claim that the Ordinances unconstitutionally confine their freedom of expression. They seek an injunction against the Ordinances' enforcement and damages.

Appellants' challenge to the Ordinances mirrors those of other adult business owners in other cities. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 41-46, 106 S.Ct. 925, 926-28, 89 L.Ed.2d 29 (1986): *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1276-77 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989). Because these cases have decided the threshold issues in adult business zoning litigation, the parties stipulated that the Ordinances abridge protected speech, but do so to serve the substantial governmental interest of curbing the crime and urban blight associated with adult businesses. The only issue that the parties present in this case is whether the Ordinances allow appellants reasonable alternative avenues of communication.

At trial, the parties presented evidence of their respective positions on the number of adult business sites and amount of acreage that comply with the Ordinances. Patricia Garcia, El Paso's Planning Coordinator, testified that the Ordinances permit 78 adult business sites on 1,433, or

0.91%, of El Paso's 158,000 acres. Appellants then offered expert testimony to show that it is impossible for them to relocate on most of these 1,433 acres.

The only instruction the district court gave to guide the jury in deciding what alternative land was reasonably available to the adult businesses closed by the ordinance stated:

> [f]or the purpose of determining whether acreage or sites are "reasonably available," you are instructed that adult entertainment businesses must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. Acreage and sites are not "unavailable" solely because they are already occupied by existing businesses, or because "practically none" of the undeveloped land is currently for sale or lease, or because in general there are no "commercially viable" adult entertainment sites within the area which complies with the ordinance. Although the First Amendment guards against the enactment of zoning ordinances which have "the effect of suppressing, or greatly restricting access to lawful speech," the First Amendment does not compel the City of El Paso to insure adult entertainment businesses, or any other kind of speech related businesses, will be able to obtain sites at bargain prices.

The jury found that 39 adult businesses operated in El Paso on March 22, 1988, the Ordinances allow for 59 adult business sites on 1,165 acres, and the Ordinances do not deny appellants "a reasonable opportunity to open and operate their adult entertainment businesses." The district court upheld the Ordinances' constitutionality pursuant to the jury's verdict.

II. DISCUSSION

Appellants claim, *inter alia*, that the portion of the court's jury charge previously quoted misled the jury about the proper law to apply in answering the court's special interrogatories. They asked the court to instruct the jury not to consider land to be available as an alternative avenue of communication for speech affected by the Ordinances if it would be unreasonable to expect adult businesses to relocate on the land from a physical, legal, or economic standpoint. Instead, the court gave the instruction previously quoted.

El Paso contends that the instruction was not improper, arguing that the instruction was taken verbatim from the Supreme Court's holding in *Renton*. El Paso also urges the instructions were sufficient considering the entire charge and that counsel were allowed to argue unreasonableness to the jury.

A. UNAVAILABLE LAND UNDER RENTON

"[T]he First Amendment requires only that [El Paso] refrain from *effectively* denying [appellants] a reasonable opportunity to open and operate [adult businesses] within the city...." *Renton*, 475 U.S. at 54, 106 S.Ct. at 932 (emphasis added). Appellants argue that any land that is "completely unsuited" for use as an adult business is as effectively denied to them by the Ordinances, citing *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir. 1982). Based on this authority, appellants conclude that none of the following places offer them a reasonable opportunity to open and operate their adult businesses: 1) industrial warehouse areas; 2) drainage areas on which El Paso would permit no business to build; 3) areas where topography makes it impossible or impractical to build; 4) land subject to restrictive covenants

that exclude adult businesses;[1] 5) airport land owned by El Paso that, as a political and practical matter, El Paso would never lease to appellants; and 6) wholly undeveloped desert.

The *Basiardanes* court followed *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78, 96 S.Ct. 2440, 2456, 49 L.Ed.2d 310 (1976), in considering the *effect* that Galveston's adult business zoning laws had on access to speech protected by the First Amendment. *Basiardanes*, 682 F.2d at 1214; *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 71, 101 S.Ct. 2176, 2184, 68 L.Ed.2d 671 (1981) (distinguishing an ordinance banning nude dancing from the ordinance at issue in *Young* because the *Young* ordinance "did not effect the number of adult movie theaters that could operate in the city ..."). Holding that Galveston's zoning ordinance "drastically impairs the availability" of protected speech and cannot withstand constitutional scrutiny as a time, place, and manner restriction, the *Basiardanes* court explained that:

> [i]n the ten percent to fifteen percent of the city [from which they are] not categorically banned, adult theaters may operate only in the industrial zones at a great distance from other consumer-oriented establishments. Few access roads lead to the permitted locations, which are found among warehouses, shipyards, undeveloped areas, and swamps. These locations are poorly lit, barren of

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1. In his concurrence to *Reitman v. Mulkey*, 387 U.s. 369, 385, 87 S.Ct. 1627, 1636, 18 L.Ed.2d 830 (1967), Justice Douglas stated that "restrictive covenants 'constitute[] a restraint on alienation of property, sometimes in perpetuity, which, if valid, [i]s in reality the equivalent of and ha[s] the effect of state and municipal zoning laws....'" (quoting *Bell v. Maryland*, 378 U.S. 226, 329, 84 S.Ct. 1814, 1870, 12 L.Ed.2d 822 (1964) (Black, J., dissenting)).

> structures suitable for showing films, and perhaps unsafe. In theory they are available to adult movie proprietors and patrons, but in fact they are completely unsuited to this use.

Basiardanes, 682 F.2d at 1214; *accord Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207, 1216-17 (N.D.Ga. 1981) (without considering land price or whether land was for sale, only approximately ten of 81 sites argued to be available under Atlanta zoning ordinance are constitutionally available; other 71 sites are physically, legally, or practically unavailable). Similarly, at least some of the sites that appellants here sought to exclude from consideration as reasonable alternative avenues of communication are likely completely unsuited for appellants' purposes.

El Paso relies on *Renton*. Discussing reasonable alternatives left by Renton's zoning ordinance, the Court stated:

> The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of "[a]mple, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." App. to Juris. Statement 28a.
>
> [The adult business owners] argue, however, that some of the land in question is already occupied by existing businesses, that "practically none" of the undeveloped land is currently for sale or lease, and that in general there are no "commercially viable" adult theater sites within the 520 acres left open by

the Renton ordinance. Brief for Appellees 34-37. The Court of Appeals accepted these arguments, concluded that the 520 acres was not truly "available" land, and therefore held that the Renton ordinance "would result in a substantial restriction" on speech. [*Playtime Theaters, Inc. v. City of Renton*] 748 F.2d [527] at 534 [9th Cir. 1984].

We disagree with both the reasoning and the conclusion of the Court of Appeals. That [the adult business owners] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," *American Mini Theatres*, 427 U.S. at 71, n.35. 96 S.Ct. at 2453, n. 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See *id.* at 78, 96 S.Ct. at 2456 (POWELL, J., concurring)("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from effectively denying [the adult business owners] a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement.

Renton, 475 U.S. at 53-54, 106 S.Ct. at 932 (footnote omitted). We recite further facts concerning Renton's ordinance to fully explore the significance of the Court's passage. The Ninth Circuit concluded that "a substantial part" of the 520 acres open to adult movie theaters under Renton's zoning ordinance was unavailable for First Amendment purposes because that *part* was occupied by a sewage treatment facility, a horse racing facility, an industrial building park, warehouse and manufacturing facilities, an oil tank farm, and a fully developed shopping center. *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 534 (9th Cir. 1984), rev'd, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The Court did not mention, let alone individually review, any of the uses found by the Ninth Circuit to be unavailable. It simply "disagree[d] with both the reasoning and the conclusion of the Court of Appeals." *Renton*, 475 U.S. at 54, 106 S.Ct. at 932.

We will not read the Court's *Renton* decision to deem sewage treatment facilities as reasonable alternative avenues of communication for protected speech, especially when there is a much more plausible understanding of the Court's disagreement with the Ninth Circuit's reasoning. Renton's city council enacted its zoning ordinance before *any* adult businesses moved into the city. *Renton*, 475 U.S. at 44. 106 S.Ct. at 927. Playtime Theatres was apparently the first adult movie theater operator attempting to locate in Renton and it wanted to open only two theaters. Because there was not a great demand for adult business space in Renton, it did not have to provide a great number of alternate adult business locations in its zoning laws to meet the First Amendment's requirement of allowing "reasonable alternative avenues of communication." *id.* at 50, 106 S.Ct. at 930,[2]

2.The Court cites *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981) as authority for its test for the reasonableness of

and not have "'the effect of suppressing, or greatly restricting access to, lawful speech.'" *Id.* at 54, 106 S.Ct. at 932 (quoting *Young*, 427 U.S. at 71 n.35, 96 S.Ct. at 2453 n.35); *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1110 (9th Cir. 1988), *cert. denied*, 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989). In *all* of the 520 acres zoned for adult movie theaters, Renton argued that there were over 400 potential adult movie theater sites. Brief for Appellants, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), (No. 84-1360) (LEXIS, Genfed library, Briefs file). Thus, even without the "substantial part of the 520 acres" that the Ninth Circuit found to have been constitutionally unavailable, the Court obviously could have found two available sites.[3] The first and last sentences in the lengthy *Renton* passage previously quoted indicate that the Court recognized evidence of adequate alternative channels of communication for the speech limited by Renton's ordinance and therefore support our interpretation of *Renton*. The Court did not disagree with all of the Ninth Circuit's constitutional availability determinations. Rather, it disagreed with the Ninth Circuit's reasoning because the Ninth Circuit found that Renton's

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Renton's time, place, and manner restriction on speech. *Renton*, 475 U.S. at 50, 106 S.Ct. at 930. In *Heffron*, though, the Court worded the second prong of the time, place, and manner test differently than it did in *Renton*. In *Heffron*, the Court stated that content-neutral time, place, and manner restrictions on protected speech must "leave open *ample* alternative channels for communication." 452 U.S. at 648, 101 S.Ct. at 2564 (emphasis added, citing cases).

3.It is also possible that the Court disagreed with only some of the Ninth Circuit's characterizations of unavailable land, such as the "fully-developed shopping center." *Renton*, 748 F.2d at 534. There is nothing to indicate that the owners of the shopping center were barred by restrictive covenants from leasing to adult movie theaters, so, depending on the shopping center's size, it alone could have provided a reasonable alternative avenue of communication for Playtime Theatres.

zoning ordinance allowed insufficient alternative avenues of communication exclusively based on the court's determination that much land was effectively unavailable to Playtime Theatres. *Renton* reaffirms *Young's* teaching that the only correct inquiry is whether the land that *is* constitutionally available is also sufficient to avoid suppressing access to protected speech. *See Renton*, 475 U.S. at 54, 106 S.Ct. at 932 (quoting *Young*, 427 U.S. at 71 n.35, 96 S.Ct. at 2453 n.35).

[1-3] This court has cited *Basiardanes'* communication avenue suitability holding with approval even after *Renton*. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, 1303 (5th Cir. 1988), *aff'd in part and rev'd in part on other grounds*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *see also SDJ*, 837 F.2d at 1275, 1278 (citing *Basiardanes* with approval for propositions other than its communication avenue suitability holding).[4] *Renton* expressly recognizes that El Paso cannot zone in a manner that effectively denies appellants "a reasonable opportunity to open and operate an adult theater within the city." *Renton*, 106 S.Ct. at 932. When *Renton* stated that the theater owners "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees" *Id.*, the Court obviously contemplated there was a "market" in which businesses could purchase or lease real property on which business could be conducted. A real estate market that provides no opportunity to compete cannot provide a reasonable opportunity to do so. As Justice Powell's concurrence in *Young v. American Mini Theaters* made clear, the court's inquiry in this type of case looks to the "effect of

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4.The *SDJ* court never had occasion to address *Basiardanes'* communication avenue suitability holding because, like *Renton*, the zoning ordinance at issue in *SDJ* provided so many alternate sites that Houston's adult businesses could not legitimately argue that they were denied reasonable alternative avenues of communication.

the ordinance upon freedom of expression." 96 S.Ct. at 2456. Land can be completely unsuitable for conducting an adult business if its physical, legal, or economic character prohibits its use by any such business.[5] Cities that allocate

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5. The standard for determining when land is economically unsuitable as an alternative avenue of communication remains obscure. We need not attempt to pierce this obscurity to decide this appeal. Appellants' proof and contentions at trial dealt exclusively with physical and legal unavailability.

However, because the line between legal and physical characteristics on the one hand and economic impracticality is thin, the economic issue may well occur on remand.

There is a reasonable, efficient way to protect sexually-oriented expression from over-zealous zoning laws without guaranteeing adult business owners' profits, while remaining true to *Renton* and *Young*. It is practically irrelevant to the First Amendment's alternative avenue availability inquiry whether a particular adult business, with its management, financing, and capital costs, can make a profit and comply with a challenged zoning ordinance. The First Amendment does not guarantee speech-related businesses the right to stay in business, let alone any particular profit margin, solely by virtue of their relationship to speech. *See SDJ*, 837 F.2d at 1276-77 ("alternative sites need not be commercially viable"). The First Amendment only protects speech, so, under Justice Powell's *Young* reasoning, the economic impact of a challenged law on speech-related businesses is only significant to the extent that it suppresses people's ability to convey and receive protected messages. That a business' operating costs under a challenged ordinance would render it unprofitable does not mean that the ordinance has suppressed people's ability to convey protected messages. Likewise, if a business must charge exorbitant prices to comply with a challenged ordinance, the ordinance does not necessarily interfere with people's ability to receive protected messages. A challenged adult business zoning ordinance only has the effect of suppressing protected speech if the economic burdens that it imposes on all adult businesses has the *net* effect of limiting access to the speech.

In practical terms, this means that economic unsuitability determinations are to be made on a macro scale. Land is only economically unsuitable as a reasonable alternative avenue of communication if no adult business could possibly expect to profit by opening there. *Accord, Alexander v. City of Minneapolis*, 928 F.2d 278,

only completely unsuitable land for adult business use do exactly what the Court proscribed in *Renton* and *Young: effectively* suppress protected speech.

B. JURY CHARGE SUFFICIENCY

[4] A district judge must "'instruct the jurors, fully and correctly, on the applicable law of the case, and ... guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth.'" *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 424-25 (5th Cir. 1985) (quoting 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2556 at 654 (1971)). Although we afford judges "wide latitude in fashioning jury instructions," we will reverse and remand "'[i]f the charge as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'" *Id.* at 425 (quoting *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 (5th Cir. 1979).

The trial court gave this jury insufficient guidance in resolving the crucial issue of what land they could consider as available for First Amendment purposes when it instructed that:

> [a]creage and sites are not "unavailable" solely because they are already occupied by existing businesses, or because "practically none" of the undeveloped land is currently for sale or lease, or because in general there are no "commercially viable" adult entertainment

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283-84 (8th Cir. 1991)(district court erred in striking down adult business zoning ordinance based on irrelevant evidence that ordinance's challenger could not find an economically suitable relocation site when other adult business owners found suitable relocation sites). This understanding of economic unsuitability dovetails with our statements regarding physical and legal unsuitability in that almost all forms of physical and legal unsuitability may be couched in terms of economic unsuitability.

> sites within the area which complies with the ordinance.

Like El Paso's attorneys and the staff of Harvard's Law Review, *see The Supreme Court--Leading Cases*, 100 HARV.L.REV. 100, 197 (1986), the jury could easily take this *Renton* paraphrase to mean that all land made available to appellants by the Ordinances is to be considered a reasonable alternative avenue of communication for constitutional purposes. While we recognize that the jury did not find constitutionally available all of the land that El Paso *argued* to have been open to adult businesses under the Ordinances, the jury found that approximately 565 acres of desert that does not have roads, utilities, and structures qualifies as a reasonable alternative avenue of communication for adult businesses.[6] Given their findings and the court's charge, the jury either guessed as to constitutionally available acreage or equated constitutional availability with availability under the Ordinances, after rejecting some of El Paso's evidence as to the amount of land the Ordinances left open.

El Paso's argument that the instructions were sufficient in light of the whole charge given overlooks the fact that the portion quoted above was the *only* instruction given on reasonable availability. The city's contention that argument of counsel could supplement the charge is contrary to the court's specific instruction that the statements, objections, and arguments of counsel served only to call attention to facts and inferences that might otherwise escape notice and were not to be considered as evidence in the case.

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6. In response to a special interrogatory, the jury stated that 1165 acres comply with the Ordinances and are reasonably available to adult entertainment businesses on which to open and operate. El Paso's Planning Coordinator, Patricia Garcia, testified that only six hundred of the acres open to adult businesses under the Ordinances have streets, utilities, and buildings.

Appellants contend that it would be unreasonable to limit relocation of adult businesses to property where it is physically or legally impossible for them to conduct business. Appellants argue that land may not be considered reasonably available for First Amendment purposes where the land: has nothing on it; has topographical or physical impediments to building; lacks street access; entails an extraordinarily high cost of building; lacks available utilities; is landlocked; is an area of concrete retaining walls; is a United States Customs holding area; is a cotton field and has sharecropper houses; contains large industrial warehouses; consists of sand dunes, cliffs, gullies and ponding areas, including the Jesuit Drain basin, Peter Cooper ponding area and Pullman Drain; or, is desert land. These alleged faults which appellants say make these alternative locations unreasonable depend on the land's physical qualities or characteristics.

Appellants also argue that land may not be considered available for First Amendment purposes where the land: could not receive a city building permit because it is a ponding area; is airport property where the city would never approve a lease to an adult business; is the portion of a shopping mall area required by law to be dedicated to parking; is subject to restrictive covenants that prohibit its use for an adult business; or, is subjected to deed restrictions or special contracts which proscribe adult businesses or retail use. Each of these alleged faults depends on the land's legal characteristics.

Appellants also assert that economic or business considerations affect the availability of some land as reasonable alternatives. In this case the alleged "economic" impracticability of the land is really a consequence of the land's physical or legal characteristics. Appellants do not contend that any of the available property now owned or used by other types of businesses is so expensive to purchase or lease that no adult business could economically afford it. Such a contention would have presented a more difficult

issue but one which was not raised by the proof in this record. *See* n.5 *supra*.

[5] Appellants also complain that some property is currently in use. *Renton* responds, in part, to this contention. The fact that a business is operated on a particular parcel of property does not necessarily take the property out of the marketplace where adult businesses must fend for themselves. If, however, a business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or any other business enterprise. Such a leasehold could legally bar appellants' use in the same manner as restrictive covenants or zoning prohibitions.

[6] As to those aspects of physical or legal unavailability that were put in issue by the evidence and required some fact determination, the court should have told the jury that land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there. We do not fault the Court's use of special interrogatories requiring the jury to find the number of adult businesses in operation in El Paso on March 22, 1988; the number of sites and amount of acreage left available by the Ordinances; and whether appellants were denied a reasonable opportunity to open and operate their businesses. We do hold that the instruction language which the Court recast from a part of the *Renton* opinion did not respond to issues raised, nor did it adequately guide the jury in resolving the facts presented by today's case.

C. PARTIES' STIPULATION REGARDING FACTUAL CONSTITUTIONALITY

Pursuant to the parties' stipulation that "[t]he ordinance in question is constitutional on its face," the court instructed the jury that "the parties agree that the adult business ordinance in question is constitutional on its face; that is, the adult business ordinance ... does not unreasonably

limit alternate avenues of communication."

The record confirms that there was substantial confusion regarding exactly what appellants meant by their stipulation to the Ordinances' facial constitutionality. Apparently, in light of *Renton, SDJ,* and *FW/PBS* appellants conceded that the Ordinances are content neutral and serve a substantial governmental interest. They never specifically conceded the facial reasonableness of the Ordinances' limitation on alternative avenues of communication. Instead, appellants repeatedly asserted that their only objection to the Ordinances is the severity of its limitations on their activities, not the fact that the Ordinances limit their activities. The stipulation appears to concede too much, but that did not mislead El Paso about the crux of this lawsuit.

We think that the court's instruction on facial constitutionality prejudiced appellants because it did not help the jurors decide whether the Ordinances deprive appellants of their First Amendment rights and it had tremendous potential to lead jurors to think that appellants agreed that the Ordinances provide constitutionally adequate alternative avenues of communication. We caution the district court against reusing its instruction on facial constitutionality. The court must also reconsider appellants' claim under the Texas Constitution in light of our holding that appellants contended throughout this lawsuit that the Ordinances do not provide them reasonable alternative avenues of communication.

REVERSED and REMANDED.

APPENDIX B
(Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, dated April 21, 1992)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8269

PHYLLIS WOODALL, ET AL.,

Plaintiffs-Appeliants,

versus

THE CITY OF EL PASO, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(April 21, 1992)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 9, 1992, 5th Cir. 1992, __ F.2d __)

Before REAVLEY and JONES, Circuit Judges.*

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*Chief Judge Charles Clark was a member of the original panel but resigned from the Court on January 15, 1992, and therefore, did not participate in this decision. This matter is being decided by quorum. 28 U.S.C. 46(d).

PER CURIAM:

The court withdraws its discussion entitled "Unavailable Land under Renton" contained in Part A of its opinion (950 F.2d 258) because the court regards that discussion unnecessary to decide this case. The cross-reference from the remainder of the opinion back to Part II.A (*id.* at 262) should also be considered deleted.

We reiterate, however, our conclusion that the jury received an inadequate instruction under the facts of this case. The record offers no clue as to how the jury determined what land not foreclosed to adult businesses by El Paso's ordinance was physically or legally impossible for them to locate upon.[1] It appears that many acres offered by the city partook of such disabling physical or legal characteristics, yet the jury's findings bear no resemblance whatever to any conceivable theory of inclusion or exclusion of such parcels.

In so holding, we do not endorse appellants' formulation that land is not available for use by the adult businesses if it would be "unreasonable" to expect adult businesses to relocate there. Rather, the jury should have been instructed, in addition to the substance of the charge given, that land with physical characteristics that render it unavailable for any kind of development, or legal characteristics that exclude adult businesses, may not be considered "available" for constitutional purposes under *Renton*. *Renton* held that "the First Amendment requires only that [El Paso] refrain from effectively denying [appellants] a reasonable opportunity to open and operate [adult businesses] within the city...." *Renton*, 475 U.S. at 54, 106 S.Ct. at 932. When *Renton* stated that the theater owners "must fend for themselves in the real estate market, on an equal footing

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1. The adult businesses made no contention on, and we do not address, the relationship between the economics of site location and the constitutionality of an adult business zoning ordinance.

with other prospective purchasers and lessees," *id.*, the Court obviously contemplated that there was a "market" in which businesses could purchase or lease real property on which business could be conducted. A real estate market that provides no opportunity to compete cannot provide a reasonable opportunity to do so. Cities that allocate only land that is completely unsuitable from a legal or physical standpoint for adult business use do exactly what the court proscribed in *Renton: effectively* suppress protected speech.

The petition for rehearing is otherwise DENIED. A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

APPENDIX C
(Judgment of the United States District Court,
Western District of Texas, El Paso Division)

FILED
MAR 12 1990
CHARLES W. VAGNER, Clerk
By /s/ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

PHYLLIS WOODALL, et al Plaintiffs, vs. THE CITY OF EL PASO, TEXAS, et al. Defendants.	}	NO. EP-88-CA-127G

JUDGMENT

On the 11th day of January, 1990, came on to be heard the above entitled and numbered cause; and came PHYLLIS WOODALL and JEANNIE COUTTA d/b/a THE NAKED HAREM and the COSMOPOLITAN, et al., Plaintiffs, in person and by and through their attorneys of record, and came the Defendant the CITY OF EL PASO, JOHN SCAGNO, and RAUL PROVENCIO, by and through their attorney of record; and all parties having announced ready for trial, and a jury consisting of six (6) duly and legally qualified and chosen jurors, having been empaneled, selected and sworn to try this case, the case proceeded to trial. The Court and jury heard the pleadings and evidence introduced upon the trial of this case, and the case thereafter proceeded to trial to the 19th day of January, 1990. At the time Plaintiffs rested their case, the Defendant CITY OF EL

PASO moved for a directed verdict with respect to several claims of the Plaintiffs and with respect to Defendants JOHN SCAGNO and RAUL PROVENCIO.

The Court, having considered the evidence and arguments of counsel, and the Court finding that the Plaintiffs failed to proffer any evidence to assert a claim against Defendants SCAGNO and PROVENCIO, and thereby granted the Motion for Directed Verdict with respect to Defendants SCAGNO and PROVENCIO.

With respect to the Motion for Directed Verdict of Defendant CITY OF EL PASO with respect to various claims of the Plaintiffs, the Court rules as follows:

1. With respect to Plaintiffs' claims under Article I, Section 8 of the Texas Constitution, the court finds that the parties have stipulated that the ordinance is facially constitutional; that is to say, the parties have stipulated that the adult business ordinance in question is "content-neutral" as to time, place and manner; that it is designed to serve a substantial governmental interest; and that it does not unreasonably limit alternate avenues of communication. The Court further finds with respect to Plaintiffs taking claim under the Texas Constitution that there is no common law cause of action for recovery of damages, and further finds that Plaintiffs have cited no authority authorizing the issuance of an injunction in a matter where the parties have stipulated that the ordinance is constitutional. Thus, with respect to Plaintiffs' claims under Article I, Sections 8 and 17 of the Texas Constitution, the Motion of the Defendants for Directed Verdict is hereby GRANTED.
2. With respect to Plaintiffs conspiracy claim against the Defendants under the common law and under 42 U.S.C. 1985, the Court finds that there was no evidence of a conspiracy presented by Plaintiffs as to any of the Defendants, and therefore, Defendants'

Motion for Directed Verdict with respect to this claim is also hereby GRANTED.

3. With respect to Plaintiffs' inverse condemnation claim under the federal and state constitutions, the Court finds that Plaintiffs have failed to present any evidence that they were denied all use of their property. Further, the Court finds with respect to this claim that any "taking" claim is moot as to all non-property owner Plaintiffs and that as to the property owners, there was no evidence presented of a "taking". Thus, Defendants' Motion for Directed Verdict with respect to Plaintiffs' inverse condemnation claim under both the federal and state constitution is GRANTED.

4. With respect to Plaintiffs' claims that the CITY OF EL PASO and the rest of the Defendants have interfered with or impaired Plaintiffs' contractual obligations, the Court finds that:Plaintiffs failed to present any evidence that would give rise to any such claims; thus, Defendants' Motion for Directed Verdict with respect to this claim is likewise GRANTED.

5. With respect to Plaintiffs equal protection theory or claim, the Court finds under the authority of *Young v. American Mini-Theatres*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976) that there is no equal protection violation if adult businesses are treated differently from other businesses with respect to the CITY OF EL PASO'S zoning ordinance in question. Furthermore, the Court finds that Plaintiffs did not challenge the city ordinance which authorizes the custodial arrest of Plaintiffs for violating the City's zoning ordinance. Thus, with respect to Plaintiffs' equal protection claim against Defendants, Defendants' Motion for Directed Verdict is in all things GRANTED.

6. With respect to Plaintiffs' claims that the values of Plaintiffs' property have been reduced as a result of the enforcement activities of Defendants', the Court finds that there was no evidence presented by Plaintiffs giving rise to any such claim. Specifically, the Court finds that there was no evidence of diminution presented by Plaintiffs in this case. Thus, with respect to this claim, Defendants' Motion for Directed Verdict is in all things GRANTED.

7. With respect to Plaintiffs' claim that the ordinance and the enforcement activities of Defendants deprived them of the opportunity to recoup or recover their costs or investment, the Court finds that no evidence was presented by the Plaintiffs which would give rise to this claim. Thus, Defendants' Motion for Directed Verdict with respect to this claim is in all things GRANTED.

8. With respect to Plaintiffs' claims that the Defendants, by arresting the lessees of property, but not the owners, engaged in a violation of Plaintiffs' due process rights, the Court finds that any such claim, was abandoned by Plaintiffs as there is no mention of any such claim in the pretrial order which was filed by the parties in this case. Thus, with respect to any such due process claim the Motion of the Defendants for Directed Verdict is in all things GRANTED.

9. With respect to the allegation and claim of the Plaintiffs that the ordinance in question is overly broad, the Court finds that Plaintiffs failed to produce or furnish any authority supporting such claims and further finds that such a claim, if any, was abandoned by the Plaintiffs. Thus, with respect to this claim, the Motion for the Defendants for Directed Verdict is in all things GRANTED.

10. All other Motions for Directed Verdict by the Defendants were DENIED, and the case proceeded to

trial.

On the 23rd day of January, 1990, after hearing all the evidence, arguments of counsel, and instructions of the Court, the case was submitted to the jury upon a written verdict consisting of special interrogatories propounded by the Court. The jury retired to consider its verdict on said date.

On the 24th day of January, 1990, at 1:35 o'clock P.M., the jury returned to the Court with its unanimous verdict in response to the interrogatories submitted to them by the Court, making the following findings and rendering the following unanimous verdict:

INTERROGATORY NO. 1

Please find from a preponderance of the evidence the number of adult businesses in operation within the CITY of EL PASO, TEXAS, on March 22, 1988.

ANSWER:

Number of businesses: 39

INTERROGATORY NO. 2.

Find from a preponderance of the evidence the number of acres of land within the CITY OF EL PASO, TEXAS which comply with the adult business ordinance in question and which are reasonably available to adult entertainment business on which to open and operate.

ANSWER:

Number of acres: 1,165

INTERROGATORY NO. 3.

Find from a preponderance of the evidence the number of sites within the CITY OF EL PASO, TEXAS which comply with the adult business ordinance and which are reasonably available to adult entertainment businesses on which to open and operate.

ANSWER:

Number of sites: 59

INTERROGATORY NO. 4.

Considering all circumstances in existence on March 22, 1988, including, but not limited to your findings as to the number of adult businesses in operation in Interrogatory No. 1, the acreage available in Interrogatory No. 2 and the number of sites available in Interrogatory No. 3, do you find from a preponderance of the evidence that the adult business ordinance of the CITY OF EL PASO effectively denied these Plaintiffs a reasonable opportunity to open and operate their adult entertainment businesses?

ANSWER "We do" or "We do not"

ANSWER: "We do not"

INTERROGATORY NO. 5

What amount of money, if any, do you find from a preponderance of the evidence, would reasonably compensate Plaintiffs for their actual damages in the past? Answer in dollars and cents.

A. Lost income and other expenses:

"None"	Phyllis Woodall and Jeannie Coutta, d/b/a The Naked Harem and Cosmopolitan Club
"None"	Jedjo, Inc., SMD Enterprises, Inc., d/b/a The Lamplighter and Red Flame
"None"	Hiroyoshi Iwabuchi, a/k/a Henry Iwabuchi and Luz Iwabuchi and Estela Rodriguez,

d/b/a Cabaret

"None" Enrique Villanueva, d/b/a Swingers Boutique

"None" Willie Ceniceros, d/b/a Swingers Cinema

B. Pain, suffering and emotional distress:

"None" Soledad Aguayo

"None" John Luciano

Said jury findings were duly received by the Court and the jury was dismissed on the 24th day of January, 1990, and their unanimous verdict filed among the papers of this cause with the Clerk of the United States District Clerk for the Western District of Texas, El Paso Division, on the 24th day of January, 1990.

It is therefore, ORDERED, ADJUDGED AND DECREED, as a matter of law, that the zoning ordinance in question is constitutional on its face; that is, the adult business ordinance in question is "content neutral" as to time, place and manner. The Court further finds that it is designed to serve a substantial governmental interest; and that it does not unreasonably limit alternative avenues of communication.

It is further ORDERED, ADJUDGED AND DECREED, in accordance with the unanimous verdict of the jury, and independent of such jury findings, that as a matter of law, the adult business ordinance in question is constitutional as applied to Plaintiffs.

It is therefore ORDERED, ADJUDGED AND DECREED in accordance with the unanimous verdict of the jury as set out above, that Plaintiffs shall take nothing of and from the Defendants, that the above entitled and numbered cause be in all things dismissed on the merits as to the

Defendants with prejudice, and that said Defendants have and recover of and from the Plaintiffs all costs of suit.

SIGNED this 10th day of March, 1990.

/S/
EMILIO GARZA
UNITED STATES DISTRICT JUDGE

Q:WOODALL.4

APPENDIX D
(Interrogatories to Jury)
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

PHYLLIS WOODALL, & JEANNIE D/B/A THE NAKED HAREM; ALMA RUIZ, SOLEDAD AGUAYO, JOHN LUCIANO, WHANPEN DUBOIS, CHRISTINA JAMES & ELENA ANNA BROWN, EMPLOYEES OF PHYLLIS WOODALL & JEANNIE COUTTA; LOUISE COMPTON, KEN COMPTON, D/B/A TRIXX ADULT THEATRE; JEDJO, INC., SMD ENTERPRISES, INC., D/B/A THE LAMPLIGHTER & RED FLAME, MARC DIEDRICH, PRESIDENT, BRUCE SEIKO, MANAGER; HIROYOSHI IWABUCHI & WIFE LUZ IWABUCHI, HENRY IWABUCHI, ESTELLE RODRIGUEZ, D/B/A LATIN PALACE & CABARET ENRIQUE VILLANUEVA, WILLIE CENICEROS, D/B/A SWINGER'S CINEMA, PLAINTIFFS	}{	
V.	}{	CASE NO. EP 88 CA 127
THE CITY OF EL PASO, TEXAS, THE MAYOR, JONATHAN ROGERS, EACH CITY REPRESENTATIVE, SUZIE AZAR, JIMMY GOLDMAN, TONY PONCE, JETHRO HILLS, ED ELSEY, ROBERT CANDELARIA, THE CITY ATTORNEY, DAVID	}{	

CAYLOR, THE CITY PROSECUTOR }{
HERB FLEMMING, THE CHIEF }{
OF POLICE OF THE CITY OF }{
EL PASO, TEXAS, JOHN SCAGNO; }{
THE CHIEF ADMINISTRATOR OF }{
THE ZONING OFFICER DEPARTMENT }{
OF THE CITY OF EL PASO, TX., R.A. }{
PROVENCIO, AND HEAD OF VICE }{
SQUAD, LUIS BARBA, }{
DEFENDANTS }{

INTERROGATORIES TO THE JURY

INTERROGATORY NO. 1

Please find from a preponderance of the evidence the number of adult business[es](smg) in operation within the City of El Paso, Texas on March 22, 1988.

__39__ Number of Businesses

INTERROGATORY NO. 2

Find from the preponderance of the evidence the number of acres of land within the city of El Paso, Texas which comply with the adult business ordinance in question and which are reasonably available to adult entertainment businesses on which to open and operate?

__1165__ Number of Acres

INTERROGATORY NO. 3

Find from a preponderance of the evidence the number of sites within the city of El Paso, Texas which comply with the adult business ordinance and which are reasonably available to adult entertainment businesses on which to open and operate.

59 Number of Sites

INTERROGATORY NO. 4

Considering all circumstances in existence on March 22, 1988, including, but not limited to your findings as to the number of adult businesses in operation in Interrogatory No. 1, the acreage available in Interrogatory No. 2 and the number of sites available in Interrogatory No. 3, do you find from a preponderance of the evidence that the adult business ordinance of the City of El Paso effectively denied these Plaintiffs a reasonable opportunity to open and operate their adult entertainment business[es](smg)?

_____ We do.

We do not. We do not.

SPECIAL INTERROGATORY NO. 5

What amount of money, if any, do you find from a preponderance of the evidence would reasonably compensate Plaintiffs for their actual damages in the past?

Answer in dollars and cents.

A. Lost income and other expenses:

none	Phylis[l](smg) Woodall & Jeannie Coutta, d/b/a The Naked Harem and Cosmopolitan Club
none	JEDJO, Inc., SMK[D](smg) Enterprises, Inc., d/b/a The Lamplighter and Red Flame
none	Hirohyshi[ho](smg) Iwabuchi a/k/a

Henry Iwabuchi, Luz Iwabuchi and Estela Rodriguez, d/b/a Cabaret

none — Enrique Villanueva, d/b/a Swinger's Boutique

none — Willie Ceniceros, d/b/a Swinger's Cinema

B. Pain, suffering and emotional distress:

none — Soledad Aguayo

none — John Luciano

APPENDIX E
(Court's Charge, pertinent provisions)
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

PHYLLIS WOODALL, & JEANNIE D/B/A THE NAKED HAREM; ALMA RUIZ, SOLEDAD AGUAYO, JOHN LUCIANO, WHANPEN DUBOIS, CHRISTINA JAMES & ELENA ANNA BROWN, EMPLOYEES OF PHYLLIS WOODALL & JEANNIE COUTTA; LOUISE COMPTON, KEN COMPTON, D/B/A TRIXX ADULT THEATRE; JEDJO, INC., SMD ENTERPRISES, INC., D/B/A THE LAMPLIGHTER & RED FLAME, MARC DIEDRICH, PRESIDENT, BRUCE SEIKO, MANAGER; HIROYOSHI IWABUCHI & WIFE LUZ IWABUCHI, HENRY IWABUCHI, ESTELLE RODRIGUEZ, D/B/A LATIN PALACE & CABARET ENRIQUE VILLANUEVA, WILLIE CENICEROS, D/B/A SWINGER'S CINEMA, PLAINTIFFS	}{	
V.	}{	CASE NO. EP 88 CA 12
THE CITY OF EL PASO, TEXAS, THE MAYOR, JONATHAN ROGERS, EACH CITY REPRESENTATIVE, SUZIE AZAR, JIMMY GOLDMAN, TONY PONCE, JETHRO HILLS, ED ELSEY, ROBERT CANDELARIA,	}{	

THE CITY ATTORNEY, DAVID }{
CAYLOR, THE CITY PROSECUTOR }{
HERB FLEMMING, THE CHIEF }{
OF POLICE OF THE CITY OF }{
EL PASO, TEXAS, JOHN SCAGNO; }{
THE CHIEF ADMINISTRATOR OF }{
THE ZONING OFFICER DEPARTMENT }{
OF THE CITY OF EL PASO, TX., R.A. }{
PROVENCIO, AND HEAD OF VICE }{
SQUAD, LUIS BARBA, }{
DEFENDANTS }{

COURT'S CHARGE TO THE JURY

SPECIAL INSTRUCTION NO. 4

In order to prove their claim, the burden is upon the Plaintiffs to establish by a preponderance of the evidence that the Defendant, City of El Paso, through its adult business ordinance has effective denied these Plaintiffs a reasonable opportunity to open and operate within the city limits of El Paso, Texas.

In deciding whether or not the City of El Paso has effectively denied Plaintiffs a reasonable opportunity to open and operate an adult entertainment business in the City of El Paso, you will need to determine:

First: The number of adult entertainment business in operation within the City of El Paso, Texas on March 22, 1988.

Second: The number of acres of land within the city limits of El Paso, Texas which comply with the adult business ordinance and which are reasonably available to adult entertainment businesses on which to open and operate.

Third: The number of sites within the city of El Paso, Texas which comply with the adult business ordinance and which are reasonably available to adult entertainment

businesses on which to open and operate.

Fourth: Whether the adult business ordinance of the City of El Paso effectively denied these Plaintiffs a reasonable opportunity to open and operate an adult entertainment business in the City of El Paso, Texas.

For the purpose of determining such issues, you must consider all circumstances in existence on March 22, 1988, the date of the last amendment to such ordinance.

"Adult business" or "adult entertainment business" as used in this charge means "adult bookstores," "adult motion picture theaters," and "nude live entertainment clubs" as defined in the adult business ordinance of the City of El Paso.

For the purpose of determining whether acreage or sites are "reasonably available," you are instructed that adult entertainment businesses must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. Acreage and sites are *not* "unavailable" solely because they are already occupied by existing businesses, or because "practically none" of the undeveloped land is currently for sale or lease, or because in general there are no "commercially viable" adult entertainment sites within the area which complies with the ordinance. Although the First Amendment guards against the enactment of zoning ordinances which have "the effect of suppressing, or greatly restricting access to, lawful speech," the First Amendment does not compel the City of El Paso to insure that adult entertainment businesses, or any other kinds of speech related businesses, will be able to obtain sites at bargain prices.

On the other hand, you may consider this evidence, along with all the evidence you have heard at trial, in arriving at your verdict, that is, in answering the fact issues you will determine; but only if you conclude by a preponderance of the evidence that the evidence in this case support such findings.

APPENDIX F
(City of El Paso Ordinance No. 6169,
dated February 21, 1978)

FIRST READING 6169
Date 1/7/78
illegible
Date 2/21/78
illegible

AN ORDINANCE AMENDING CHAPTER 25 (ZONING) OF THE EL PASO CITY CODE, THE PENALTY BEING AS PROVIDED IN SECTION 25-10 OF THE CODE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the following new section be added to Chapter 25 (zoning) of the El Paso City Code:

Section 25-49. Regulation of Certain Businesses.

PURPOSES: In the development and execution of this ordinance it is recognized that some property uses, by their very nature, have serious objectionable characteristics, including devaluation of property, particularly when more than one of these uses is established in relatively close proximity to other such uses, or in close proximity to residential neighborhoods, churches or schools. Special regulation of the uses described in this ordinance is necessary to protect residential neighborhoods and other surrounding businesses from the blighting and downgrading effects of these uses, and to protect the health, welfare and safety and morals of citizens whose homes, businesses, churches and schools may be located near these uses. The primary purpose of this ordinance is to prohibit the described uses within one thousand feet of any area zoned "residential", "planned unit development" or "mountain development", and to prevent the establishment of these uses within one thousand feet of each other, and to prevent the establishment

of these uses within one thousand feet of any church or school, which would contribute to the deleterious effects sought to be avoided by this ordinance, such as property devaluation and exposure of children to sexually explicit materials.

Uses subject to these controls are as follows: adult bookstores, adult motion picture theaters, nude live entertainment clubs.

1. Application to establish any of the above regulated uses shall be made to the Zoning Administrator, who shall not approve any such request if there is already in existence one or more such regulated use within one thousand feet of the proposed site of the regulated use, or if the proposed site of the use is within one thousand feet of any area zoned "residential," "planned unit development" or "mountain development," or if the proposed site of the regulated use is within one thousand feet of any church or school.

For the purposes of this ordinance measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises of a regulated use to the nearest property line of a church, school or district zoned "residential," "planned unit development" or "mountain development."

The Zoning Board of Adjustment may, after public notice and hearing, grant a special exception to the provisions of this ordinance if the following findings are made in addition to the requirements for obtaining special exceptions under any other applicable ordinance:

(a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this ordinance will be observed.

(b) That the establishment of a regulated use or an additional regulated use in the area will not be contrary to any program of neighborhood conservation or any improvement project.

(c) That all applicable regulations of this or any other ordinance or statute governing such use or similar uses will be observed.

2. It shall be unlawful to establish any use regulated by this ordinance if the proposed location is within one thousand feet of any district zoned "residential," "planned unit development" or "mountain development," if the proposed location is within one thousand feet of any church or school. The establishment of a church, school or district zoned "residential," "planned unit development," or "mountain development" within one thousand feet of a previously existing use regulated by this ordinance shall not render such use unlawful.

3. Definitions in this ordinance:

(a) Adult bookstore shall mean an establishment having as a substantial or significant portion of its stock in trade, books, magazines and other periodicals, and "peep shows" or film strips which are distinguished or characterized by their emphasis on pictorial or photographic representations of "specified sexual activities" or "specified anatomical areas" (as defined herein) or an establishment with a segment or section devoted to the sale or display of such material.

A "significant or substantial portion" shall mean more than one-third of the stock in trade or sales of the described material in excess of $5,000 retail value per year.

(b) Adult motion picture theater shall mean an enclosed building or outdoor screen presenting material distinguished or characterized by an emphasis on matter

depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" (as defined herein) for observation by patrons of such establishments, and which offers such materials for at least any 120 days in any 12-month period.

(c) Nude live entertainment club shall mean any bar, club, theater, lounge or establishment which offers live nude entertainment by dancers, models, actors, actresses, players, waitresses or waiters. Nude live entertainment shall mean live human dancers, models, actors, actresses, players, waitresses or waiters whose pubic area, buttock or genitals are exposed to the view of patrons at any time.

(d) Specified sexual activities shall mean:

(1) human genitals in a state of actual or simulated sexual stimulation or arousal;

(2) acts of human masterbation, sexual intercourse or sodomy;

(3) fondling or other erotic touching of human genitals, pubic region, buttock, or female breast;

(4) "sexual intercourse, "sexual contact", or "deviate sexual intercourse" as defined in Sec. 21.01 Texas Penal Code.

(e) Specified anatomical areas shall mean less than completely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola.

(f) Church shall mean any building used for public worship on a regular and continuing basis by any religious denomination or sect.

(h) School shall mean any public, private or parochial institution which offers a course of instruction for any grades from kindergarten through the twelfth grade.

4. Amortization of nonconforming uses. Any use in conflict with the purposes or terms of this ordinance which is lawfully existing at the adoption of this ordinance shall be entirely discontinued and shall thereafter cease operation within five years from the date any such use becomes nonconforming under this ordinance. If such nonconforming use is discontinued, interrupted, or changed, any future use of such land shall be in conformity with the provisions of this ordinance. Amortization of uses not conforming to the provision prohibiting location of a regulated use within one thousand feet of another regulated use shall not be required unless required by some other provision of this ordinance or other law (e.g. location within one thousand feet of residential zone).

5. If any provision, section, subsection, sentence, clause or phrase of this ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this ordinance that no portion thereof or provision, or regulation contained herein, shall become inoperative or fail by reason of any unconstitutionality of any other portion hereof and all provisions of this ordinance are declared to be severable for that purpose.

PASSED AND APPROVED this 21st day of February, 1978.

/S/

Mayor Pro-Tem

ATTEST:

/S/_____
City Clerk

APPROVED AS TO FORM:

/S/_____
Michael Spurlock
Assistant City Attorney

APPENDIX G
(City of El Paso Ordinance No. 8926,
dated February 10, 1987)

008926

AN ORDINANCE AMENDING SECTIONS 20.02.044 (ADULT BOOKSTORE), 20.02.540 (NUDE LIVE ENTERTAINMENT CLUB), 20.08.080 (ADULT BUSINESSES), AND 20.62.020 (NONCONFORMING USES AND STRUCTURES), OF TITLE 20 OF THE EL PASO CITY CODE (ZONING). THE PENALTY BEING AS PROVIDED IN CHAPTER 20.68 OF THE EL PASO CITY CODE

WHEREAS, it is the intent of the City Council of the City of El Paso to regulate the location of adult bookstores, adult motion picture theaters and nude live entertainment clubs, in such a manner as to diminish the negative secondary impacts of such uses on surrounding residential land uses while preserving a reasonable opportunity for such businesses to operate in locations which are appropriate for such uses; and

WHEREAS, the City Plan Commission held a public hearing on January 15, 1987, and made the following recommendations:

> Based on the report presented by the Department of Planning in conjunction with New Mexico State University, that adult entertainment businesses should be regulated in the Zoning Ordinance to protect neighborhood property values and to preserve the quality of life and character of these residential neighborhoods; and

WHEREAS, the City Council, at a public hearing on February 10, 1987, considered the matter of passage of an ordinance governing land use regulation of adult entertainment; and

WHEREAS, the City Council makes the following findings which for the basis for such land use regulation of adult entertainment uses:

1. Adult entertainment land uses should be regulated by zoning regulations to separate them from incompatible uses in the same manner as other land uses are regulated.
2. Property values in areas adjacent to adult entertainment land uses are adversely affected.
3. Location of adult entertainment land uses in close proximity to residential uses, churches, parks or schools is inappropriate land use, and decreases the quality of life in such areas.
4. There is a correlation between higher crime rates and concentration of adult entertainment land uses.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That Sections 20.02.044 (Adult Bookstore), 20.02.540 (Nude Live Entertainment Club), 20.08.080 (Adult Businesses), and 20.62.020 (Nonconforming Uses and Structures) of Title 20 of the El Paso City Code be and are hereby amended as follows:

Chapter 20.02

Article II. Definitions.

20.02.044, Adult Bookstore.

"Adult Bookstore" means an establishment having a majority of its stock in trade, books, magazines and other periodicals, and "peep shows" film strips, or video cassettes which are distinguished or characterized by their emphasis on pictorial or photographic representation of "specified sexual activities" or "specified anatomical areas" (as defined in this chapter), or an establishment with a section or segment devoted to the sale, rental or display of such material, where such section or segment comprises twenty percent (20%) or more of such establishment's stock in trade, sales or rentals.

20.02.540, Nude Live Entertainment Club.

"Nude live entertainment club" means any bar, club, theater, lounge or establishment which offers live nude entertainment by dancers, models, actors, actresses, players, waitresses or waiters. "Nude live entertainment" means live human dancers, models, actors, actresses, players, waitresses or waiters, exposing "specified anatomical areas" as that term is defined in this Code, to the view of patrons.

Chapter 20.08

Article II. Supplementary Use Regulations.

20.08.080, Adult Businesses.

A. No adult bookstore, adult motion picture theater or nude live entertainment club may be established within one thousand feet of the following:

1. A church.
2. A public or private elementary or secondary school.
3. A nursery school, kindergarten, child care center, day nursery or day care center.
4. A boundary of any residential district.
5. A public park adjacent to a residential district.
6. The property line of a lot devoted to any residential use.
7. Another adult bookstore, adult motion picture theater or nude live entertainment club.

B. For the purposes of this section, measurements shall be made in a straight line, from the nearest portion of the building or structure used as a part of the premises of a regulated use to the nearest property line of any uses listed in Section 20.08.080 (A.).

C. Any adult bookstore, adult motion picture theater or nude live entertainment club lawfully in existence on February 10, 1987, and not in compliance with the zoning

provisions of the City Code, shall be deemed a nonconforming use and shall comply with all of the provisions of the zoning code regulating such uses by February 10, 1988. In the case of any such uses being located within one thousand feet (1,000 ft.) of each other, the use first established and continually operating shall be allowed to continue to operate at it's location, provided such use complies with all other provisions of the zoning code.

[additional one year amort. period]

D. The subsequent establishment of any use set forth in Section 20.08.080 (A.) above within one thousand feet of a previously existing use regulated by this section shall not render such use a nonconforming or unlawful use.

E. The regulations in this zoning code of adult bookstores, adult motion picture theaters and nude live entertainment clubs are intended to be land use controls meant to regulate the harmful secondary effects of such uses only, and shall not be construed as being intended to limit access by adults to sexually oriented material, activity or expression, protected by The First Amendment of The United States Constitution.

F. Signage. The owner or operator of an adult entertainment use may erect, construct and maintain signs allowed by and conforming with Chapter 20.66 of the City Code. No signs shall contain photographs, silhouettes, drawings or pictoral representations of any manner, and may contain only the name of the regulated establishment.

G. If any section, subsection, clause or any portion of the regulations in this zoning code regulating adult bookstores, adult motion picture theaters and nude live entertainment clubs is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this code regulating such uses.

Chapter 20.62

20.62.020, Nonconforming Uses and Structures.

F. Any adult bookstore, adult motion picture theater or nude live entertainment club which is deemed nonconforming under Section 20.08.080 (C.) of Title 20 of this code, shall comply with all provisions of the zoning code regulating such uses by February 10, 1988.

1. Within thirty (30) days from February 10, 1987, the operator or owner of such permitted use shall file the name and location of the operation with the Zoning Administrator of the City of El Paso.

2. The City Council may grant an extension for operation, of nonconforming uses beyond the time provided herein, if the owner of the existing enterprise proves that he is unable to recoup his investment in such existing enterprise by that date. In order to secure an extension of time, the secure an extension of time, the owner must submit to the City Clerk a written request for such extension on or before January 10, 1988. No application for extension received by the City Clerk after January 10, 1988 shall be considered. Such written request shall set forth the following information:

(a) the amount of the owner's investment in the existing enterprise through February 10, 1987;

(b) the amount of such investment that has been or will be realized through February 10, 1988;

(c) the life expectancy of the existing enterprise;

(d) the existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such lease.

This information shall be supported by relevant documentary evidence such as financial statements and tax records. Copies of such documentary evidence must be attached to the request for extension. The City Clerk shall notify the applicant of the date and time of the City Council meeting at which time such request shall be considered by City Council.

PASSED AND APPROVED this 10th day of February, 1987.

/S/
Mayor

ATTEST:

/S/
City Clerk

APPROVED AS TO CONTENT:

/S/
Planning Department

APPROVED AS TO FORM:

/S/
Assistant City Attorney

ZNG3:028

APPENDIX H
(City of El Paso Ordinance No. 9326,
dated March 22, 1988)

009326

AN ORDINANCE AMENDING TITLE 20 (ZONING), SECTION 20.08.080 (ADULT BUSINESSES), OF THE EL PASO CITY CODE, CLARIFYING THE ACTIVITIES PROHIBITED BY THIS SECTION. THE PENALTY BEING AS PROVIDED IN SECTION 20.68.010.A OF THE EL PASO CITY CODE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

1. That Title 20 (Zoning), Section 20.08.080 (Adult Businesses), of the El Paso City Code, be amended to read as follows:

A. No person shall own, operate or conduct any business in an adult bookstore, adult motion picture theater or nude live entertainment club that is located within one thousand feet of the following:

1. A church.
2. A public or private elementary or secondary school.
3. A nursery school, kindergarten, child care center, day nursery or day care center.
4. A university, college, vocational or business school;
5. A boundary of any residential district.
6. A public park adjacent to a residential district.
7. The property line of a lot devoted to any residential use.

8. Another adult bookstore, adult motion picture theater or nude live entertainment club.

B. For purposes of this section, the following definitions shall apply:

1. Conduct Any Business.
Any person who does any one or more of the following shall be deemed to be conducting business:

(a) Operates a cash register, cash drawer or other depository on the adult business premises where cash funds or records of credit card or other credit transactions generated in any manner by the operation of the establishment or the activities conducted therein are kept;

(b) displays or takes orders from any customer for any merchandise, goods, entertainment or other services offered on the adult business premises;

(c) delivers or provides to any customer any merchandise, goods, entertainment or other services offered on the adult business premises;

(d) acts as a door attendant to regulate the entry of customers or other persons into the business premises; and

(e) supervises or manages other persons in the performance of any of the foregoing activities on the business premises.

2. Entertainment.
Any act or performance, such as a play, skit, reading, revue, pantomime, scene, song, dance, musical rendition or striptease, whether performed by employees, agents, contractors or customers. The term 'entertainment' shall also mean bartenders, waiters, waitresses or other employees exposing 'specified anatomical areas' or engaging in 'specified sexual activities' in the presence of customers.

3. Operator.
The manager or other natural person principally in charge of an adult business regulated in this section.

4. Owner or Owners.
The proprietor if a sole proprietorship, all partners (general and limited) if a partnership, or all officers, directors and persons holding ten percent (10%) of the outstanding shares if a corporation.

C. For the purposes of this section, measurements shall be made in a straight line, from the nearest portion of the building or structure used as a part of the premises of a

regulated use to the nearest property line of any uses listed in subsection A of this section.

D. Any adult bookstore, adult motion picture theater or nude live entertainment club lawfully in existence on February 10, 1987, and not in compliance with the zoning provisions of the City Code, shall be deemed a nonconforming use and shall comply with all of the provisions of the zoning code regulating such uses by February 10, 1988. In the case of any such uses being located within one thousand feet of each other, the use first established and continually operating shall be allowed to continue to operate at its location, provided such use complies with all other provisions of the zoning code.

E. The subsequent establishment of any use set forth in subsection A of this section within one thousand feet of a previously existing use regulated by this section shall not render such use a nonconforming or unlawful use.

F. The regulations in this zoning code of adult bookstores, adult motion picture theaters and nude live entertainment clubs are intended to be land use controls meant to regulate the harmful secondary effects of such uses only, and shall not be construed as being intended to limit access by adults to sexually oriented material, activity or expression, protected by the First Amendment of the United States Constitution.

G. Signage. The owner or operator of an adult entertainment use may erect, construct and maintain signs allowed by and conforming with Chapter 20.66 of the City Code. No signs shall contain photographs, silhouettes, drawings or pictorial representations of any manner, and may contain only the name of the regulated establishment.

H. If any section, subsection, clause or any portion of the regulations in this zoning code regulating adult bookstores, adult motion picture theaters and nude live entertainment clubs is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this code regulating such uses.

PASSED AND APPROVED this 22nd day of March, 1988.

/S/
Mayor

ATTEST:

/S/
City Clerk

APPROVED AS TO FORM:

/S/
Assistant City Attorney

APPROVED AS TO CONTENT:

/S/_____
Department of Planning,
Research and Development
ZNG6:003

MOTION FILED
AUG 11 1992

No. 92-110

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF EL PASO,

Petitioner,

v.

PHYLLIS WOODALL, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED BY THE CITY OF EL PASO

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Supreme Court Rules, the National Institute of Municipal Law Officers (NIMLO) requests leave of this Court to file a brief *amicus curiae* in support of Petitioner City of El Paso because consent of the Respondents has been refused. Consent of Petitioner City of El Paso has been obtained.

The members of NIMLO, including Petitioner City of El Paso, Texas, are state political subdivisions. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, or any one of some twenty other titles. Arguably, consent may not be required pursuant to Rule 37.5 because the brief is signed by municipal attorneys both on behalf of NIMLO and their own municipalities.

For all the foregoing reasons, NIMLO respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

BENJAMIN L. BROWN
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1000 Connecticut Ave., N.W.
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(202) 466-5424

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No. 92-110

In The

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THE CITY OF EL PASO,

Petitioner,

v.

PHYLLIS WOODALL, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED BY THE CITY OF EL PASO

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed pursuant to Rule 37 of the Rules of this Court, on behalf of the more than 1,500 local governments that are members of the National Institute of Municipal Law Officers (NIMLO).

The members of NIMLO, including Petitioner City of El Paso, Texas are state political subdivisions. NIMLO is

operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, or any one of some twenty other titles. The accompanying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and on behalf of each of their own municipalities.

The attorneys who operate NIMLO are responsible for advising local governments on the best methods of promoting the health, safety, and welfare of citizens through the regulation of matters which are of genuine local and municipal concern. These attorneys also represent their governments in litigation resulting from the enforcement of such regulations.

NIMLO finds this case to be of great significance. NIMLO's membership, which consists primarily of local governments, must be able to make constitutionally sound zoning and planning decisions based on clear precedent. This Court's decisions in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) provided guidance to municipalities on ways in which municipalities could enact zoning restrictions without violating citizens' rights of free expression or other constitutional protections. This case, however, reveals that courts need more specific guidance in applying these standards to "adult" business zoning ordinances.

In *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir. 1992) the Fifth Circuit held that the district court erred

because it failed to provide the jury with sufficient guidance to determine what land could be considered "reasonably available" for First Amendment purposes. NIMLO believes the Fifth Circuit ruling is a misinterpretation of the *Renton* holding and an application of the wrong legal standard.

In *Young v. American Mini Theatres, supra,* this Court held that a City of Detroit zoning ordinance, which set distance limitations for the location of adult theatres, did not violate the First or Fourteenth Amendments. *Young* also established that First Amendment inquiries do not require an analysis of economic impact. Lower courts have consistently upheld regulations that may have a detrimental economic effect on any type of commercial activity.

In *Renton,* this Court favorably cited *Young* and found that zoning regulations which circumscribe the location of adult theatres, but do not ban such theatres, are valid if the municipal legislative body enacting them reasonably believes the regulations will address problems associated with adult businesses. The *Renton* Court held that this reasonable belief need not be based upon studies or research conducted by or about the municipality itself, but can be drawn by inference from studies conducted in other municipalities.

The *Renton* decision discussed whether or not certain adult business zoning regulations allowed for "reasonable alternative avenues of communication." The Fifth Circuit holding in *Woodall v. City of El Paso,* that land which was not currently for sale or lease, undeveloped, or otherwise not "commercially viable," was not truly

available for constitutional purposes, is contrary to the holding in *Renton*.

The Fifth Circuit erred by making a distinction between land that is available in fact and land that is constitutionally available when the *Renton* standard is applied. The Fifth Circuit erroneously mandated that the jury consider physical and legal characteristics of available land, considerations explicitly rejected by this Court in *Renton*.

NIMLO is greatly concerned that this decision leaves an important area of constitutional jurisprudence in a state of confusion. The Fifth Circuit's holding in this case is also in direct conflict with several decisions of other circuits. The *Renton* and *Young* decisions are the standards set by this Court for adult business zoning regulations. If this decision is allowed to stand then NIMLO fears that many of its member municipalities will be burdened by challenges to their ordinances that misconstrue the teachings of *Renton* and *Young*.

This Court should emphatically state that the *Renton* decision rejected the consideration of legal, physical and economic aspects of available land in adult business zoning cases. Otherwise, municipalities will be forced to give site by site consideration to the land areas that are available, perhaps at bargain prices, to adult businesses.

Zoning as a means to shape the nature of a community and preserve and enhance quality of life in a community is one of the crucial powers of a municipality. *Young* and *Renton* are important tools that allow municipalities to accomplish these ends while preserving freedom of expression.

NIMLO, therefore, urges this Court to grant the Petition for a Writ of Certiorari filed by Petitioner City of El Paso, and ultimately to reverse the ruling of the Fifth Circuit Court of Appeals.

STATEMENT OF THE CASE

The statement of the case as set forth in Petitioner's Petition for Writ of Certiorari is adopted by amicus for purposes of this brief *amicus curiae*.

SUMMARY OF ARGUMENT

The Petitioner seeks review of the United States Court of Appeals for the Fifth Circuit's decision reversing and remanding this case for a new trial on the crucial issue of whether the instructions given to the jury were sufficient to guide the jury's determination of what land they could consider as "available" for First Amendment purposes. The parties entered into several stipulations and the sole issue present in this case is whether the zoning ordinance allows Respondents reasonable alternative avenues of communication.

NIMLO supports the Petition for a Writ of Certiorari because the decision of this Court in *City of Renton v. Playtime Theatres, Inc., supra*, provides the standard for determining whether "reasonable avenues of communication" exist. The United States Court of Appeals for the Fifth Circuit misapplies this standard. NIMLO also urges this Court to grant a writ of certiorari and reverse the

decision of the United States Court of Appeals for the Fifth Circuit because it is in conflict with several United States Courts of Appeal decisions, including *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991); *International Food and Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986) and *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991).

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO REVERSE THE FIFTH CIRCUIT COURT OF APPEALS' DECISION THAT LAND WHICH IS PHYSICALLY, LEGALLY, OR ECONOMICALLY UNSUITABLE FOR ADULT BUSINESSES IS CONSTITUTIONALLY "UNAVAILABLE."

A. The Supreme Court's Treatment of Zoning Laws Targeting the Secondary Effects of Adult Businesses.

In *Young v. American Mini Theatres, Inc., supra*, Justice Powell stated that "zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life,' " 427 U.S. at 80 (Powell, J., concurring) (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)). In *Young*, the Court held that the City of Detroit's zoning ordinance, which prohibited locating an adult theatre within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did

not violate the First and Fourteenth Amendments. *Id.* at 72-73 (plurality opinion of Stevens, J., joined by Burger, C.J., and White and Rehnquist, JJ.); *id.* at 84 (Powell. J., concurring). The Court found that the interest advanced by the ordinance was neighborhood stabilization, and that such an interest is important and substantial.

The ordinance reviewed in *Young* was held not to violate the First and Fourteenth Amendments despite the economic loss which it created for some engaged in the "adult entertainment" business. This was so because "[t]he inquiry for First Amendment purposes *is not concerned* with economic impact." *Id.* at 78 (Powell, J., concurring) (emphasis added). The plight of businesses forced to relocate under the ordinance was not constitutionally significant because "[i]n this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation," and because "[t]he cases are legion that sustained zoning against claims of serious economic damage." *Id.* at 78 (Powell, J., concurring).

Young's principles were reaffirmed by the Court in *City of Renton v. Playtime Theatres, Inc., supra.* The Renton ordinance, like the one in *Young*, did not ban adult theatres altogether, but merely provided that such theatres could not locate within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school. Since the ordinance circumscribed the location of adult theatres as a means of combating the harmful secondary effects of such theatres, rather than curtailing the content of speech or speech-related activity occurring therein, the ordinance was analyzed as a form of time,

place and manner regulation. 475 U.S. at 46. Such regulations are constitutional so long as they serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *Id.* at 47.

Renton advanced First Amendment jurisprudence beyond the point it had been taken by *Young* in two respects. First, the Court upheld the Renton ordinance even though it was enacted without the benefit of studies specifically related to the particular problems or needs of Renton. In the absence of such studies the Ninth Circuit invalidated the ordinance, finding that the city's justification for it was conclusory and speculative. The Supreme Court reversed, holding that the Ninth Circuit imposed an unreasonably rigid burden of proof on the city. The Supreme Court stated: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." *Id.* at 51.

The second aspect of *Renton* which expanded upon *Young* was its discussion of the requirement that time, place, and manner regulations "allow[] for reasonable alternative avenues of communication." *Id.* at 53. The ordinance in *Renton* left some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theatre sites. Respondents argued that some of that acreage was already occupied by existing businesses, that some of it consisted of undeveloped land, practically none of which was available for sale or lease, and that in general there were no "commercially viable" adult theatre sites within the 520 acres left open by the Renton

ordinance. The Ninth Circuit accepted respondents' arguments, concluding that the 520 acres was not truly available land, and therefore held that the Renton ordinance would result in a substantial restriction on speech.

The Supreme Court disagreed with both the reasoning and the conclusion of the Ninth Circuit.

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . [W]e have never suggested that the First Amendment compels the government to assure that adult theatres, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See [*Young v. American Mini Theatres, Inc.*, 427 U.S.] at 78 (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from denying respondents a reasonable opportunity to open and operate an adult theatre within the city, and the ordinance before us easily meets this requirement.

475 U.S. at 54.

B. The Fifth Circuit Departed from Renton in Woodall v. City of El Paso.

The fundamental flaw with the decision of the Fifth Circuit in the instant case is its failure to recognize that "[t]he inquiry from First Amendment purposes is not concerned with economic impact." *Young*, 427 U.S. at 78 (Powell, J., concurring), *Renton*, 475 U.S. at 54. The Fifth

Circuit's decision creates a distinction – based on economic impact – between land which is "available" in fact (i.e., permitted to be used for adult businesses under a zoning ordinance) and that which is "constitutionally available" (i.e., land which may be considered a reasonable alternative avenue of communication for constitutional purposes). *Woodall v. City of El Paso*, 950 F.2d 255, 261 (5th Cir. 1992). Such a distinction is inconsistent with the rationale and holding of *Young* and *Renton*.

In *Woodall* the parties presented evidence in support of their respective positions on the number of adult business sites and amount of acreage that comply with El Paso's zoning ordinances. The city's planning coordinator testified that the ordinances permit 78 adult business sites on 1,433, or .91%, of El Paso's 158,000 acres. Respondents submitted expert testimony to support their argument that it is *impossible* for them to relocate on most of these 1,433 acres.

Respondents submitted testimony concerning physical, legal and economic characteristics of the acreage which El Paso asserted was available for location of adult businesses. With regard to physical characteristics, respondents' evidence showed that some of that acreage:

> has nothing on it; has topographical or physical impediments to buildings; lacks street access; entails an extraordinarily high cost of building; lacks available utilities; is landlocked; is an area of concrete retaining walls; is a United States Customs holding area; is a cotton field and has sharecropper houses; contains large industrial warehouses; consists of sand dunes, cliffs, gulleys and ponding areas, including the Jesuit

> Drain basin, Peter Cooper ponding area and Pullman Drain; or, is desert land. [950 F.2d at 262]

With regard to legal characteristics, respondents' evidence showed that some of the acreage El Paso contended was "available" under the ordinances:

> could not receive a city building permit because it is a ponding area; is airport property where the city would never approve a lease to an adult business; is the portion of a shopping mall area required by law to be dedicated to parking; is subject to restrictive covenants that prohibit its use for an adult business; or, is subjected to deed restrictions or special contracts which proscribe adult businesses or retail use. [950 F.2d at 262]

The jury was requested to answer special interrogatories concerning: a) The number of adults businesses operating in El Paso when the ordinances went into effect; b) the number of adult business sites permitted under the ordinances; c) the amount of acreage upon which adult business may operate under the ordinances; and d) whether the ordinances deny respondents "a reasonable opportunity to open and operate their adult entertainment businesses." 950 F.2d at 257. To aid its deliberations the jury was instructed that:

> [a]creage and sites are not "unavailable" solely because they are already occupied by existing businesses, or because "practically none" of the undeveloped land is currently for sale or lease, or because in general there are no "commercially viable" adult entertainment sites within the area which complies with the ordinance. [950 F.2d at 261].

The jury found that 39 adult businesses operated in El Paso on March 22, 1988; the ordinances allow for 59 adult business sites on 1,165 acres; and the ordinances do not deny respondents "a reasonable opportunity to open and operate their adult entertainment business." 950 F.2d at 257.

The Fifth Circuit found the jury instructions insufficient.

It held:

> As to those aspects of physical or legal unavailability that were put in issue by the evidence and required some fact determination, the court should have told the jury that *land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there.* [950 F.2d at 262-263 (emphasis added)]

A remand to the district court based on the above-quoted direction from the Fifth Circuit will leave the district court in a quandary. The Fifth Circuit announces a new test which is not present in either *Young* or *Renton*. Under the Fifth Circuit's formulation, "land cannot be found to be reasonably available if its physical or legal characteristics [make] it impossible for any adult business to locate there." *Id.* at 263. The Fifth Circuit, however, has not defined *which* physical or legal characteristics actually make relocation impossible.

As a basis for determining whether the ordinance "allows for reasonable alternative avenues of communication," *Renton*, 475 U.S. at 53, the standard announced by the Fifth Circuit will provide the jury with no more

guidance than the instructions that the jury actually received. Indeed, under the directive provided by the Fifth Circuit, the jury will be called upon to decide an issue which should be decided as a matter of law.

The Fifth Circuit has directed the district court to instruct the jury to apply a legal standard which was repudiated in *Young* and *Renton*. The *Renton* Court held that as long as there is a reasonable opportunity for adult businesses to open and operate within the city it is of no constitutional moment that some land upon which they must relocate is already occupied by existing businesses, is undeveloped, or is not commercially viable. The Fifth Circuit in *Woodall*, however, ignored that holding. Under the formulation of the Fifth Circuit, land upon which it is "impossible" for an adult business to relocate includes, among others, land which is undeveloped, lacks street access, is desert land, or entails an extraordinarily high cost of building. At the direction of the Fifth Circuit, the jury must be instructed *not* to consider such land as being available for purposes of determining whether El Paso's ordinances allow for reasonable alternative avenues of communication. The Fifth Circuit's direction, your amicus suggests, is erroneous.

C. The Decision in Woodall Conflicts with Decisions from other Courts of Appeal.

The decision in *Woodall* is in conflict with that in *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991). In *Alexander*, the Eighth Circuit reversed the judgment of the district court that declared unconstitutional Minneapolis'

ordinances requiring adult-only businesses to operate within a specifically zoned district of the city. 928 F.2d at 280. The plaintiff in *Alexander* claimed in the district court that the ordinances would effectively put his theatres out of business because no reasonable opportunity existed for their relocation. Although the ordinances left 6.6% of the total acreage of the city's commercial land available for adult businesses, the district court declined to hold as a matter of law that the ordinances were sufficient to provide reasonable access to protected speech. Instead, the district court focused on plaintiff's testimony concerning his unsuccessful attempts to relocate his theatres, and concluded that the ordinances worked to suppress and greatly restrict access to protected speech. 928 F.2d at 283. The Eighth Circuit reversed because the district court applied an incorrect legal standard in striking down the ordinance. The Eighth Circuit stated:

> "The inquiry for First Amendment purposes is not concerned with economic impact." *American Mini Theatres*, 427 U.S. at 78 (Powell, J., concurring). The district court, however, did consider testimony by Alexander that the one potential relocation site he found was cost-prohibitive. Additional testimony from Alexander that no one would sell or lease property on which he could relocate his business was also *irrelevant* to the First Amendment inquiry. [928 F.2d at 283 (emphasis added)]

There are two significant respects in which the decisions in *Woodall* and *Alexander* conflict. First, though the *Woodall* court considered an "extraordinarily high cost of building" a physical characteristic of land which is constitutionally significant, 950 F.2d at 262, the *Alexander*

court recognizes such evidence to be irrelevant to the First Amendment inquiry. Secondly, while *Woodall* approved of the district court's use of special interrogatories requiring the jury to determine whether adult businesses were denied a reasonable opportunity to open and operate, *Alexander* recognizes that such an inquiry is to be decided as a matter of law by the court.

In *International Food and Beverage Systems v. City of Fort Lauderdale,* 794 F.2d 1520 (11th Cir. 1986) the Eleventh Circuit properly applied the *Renton* standard. Thus, this case is also in conflict with the holding in *Woodall. International Food and Beverage Systems* involved a challenge to a municipal ordinance that prohibited the operation of "nude" bars within 750 feet of any land zoned or used for residential purposes or any church, school, public park, playground or another nude bar. *Id.* at 1523. The plaintiff, an owner and operator of nude bar type businesses in several states, filed suit for injunction or declaratory judgment. *Id.* at 1524.

At trial, the city planner offered evidence of available sites, but the district court held the 25 sites included many that were "not really available" and found the ordinances unconstitutional because they were "not the least restrictive means of controlling first amendment activities." *Id.* at 1525.

The Eleventh Circuit vacated and remanded the decision for reconsideration in light of *Renton. Id.* at 1528. The district court had "finessed" the law by finding that the asserted reasons for the ordinances were pretextual, with a true purpose to suppress expression. *Id.* at 1525. The Eleventh Circuit rejected the district court's conclusion

that there was an effort to suppress expression. *Id.* at 1524. While the Eleventh Circuit acknowledged that the planning director for the city may have erred in the precise number of sites available, it found itself "at a loss how anyone could determine that as many as 22 sites for such bars were not enough, without reference to community needs, the incidence of nude bars in other comparable communities, the goals of the city plan, and the kind of city the plan works toward." *Id.* at 1525. The Eleventh Circuit added that *Renton* did not hold that the city may not "limit alternative avenues of communication," but only that "it may not limit them *unreasonably.*" *Id.* (emphasis added).

Another example of a conflict among the circuits is *D.G. Restaurant Corporation v. City of Myrtle Beach,* 953 F.2d 140 (4th Cir. 1991), where the Fourth Circuit upheld the constitutionality of an ordinance that prohibited businesses from offering nudity within 500 feet of residential areas, churches, schools, parks and other regulated adult businesses. *Id.* at 141. The Fourth Circuit held that the ordinance allowed for reasonable alternatives to the asserted regulation of speech and rejected the plaintiff's contention that the zoning ordinance effectively barred topless dancing in that area.

The business operator's argument that the Myrtle Beach ordinance limited adult business to the "C-9" zone which was comprised of "a few poorly lit sites in industrial areas, far from the tourist oriented businesses" did not persuade the Fourth Circuit that the restriction would "impede the restaurant's ability to convey its message to those listeners who desire to be enlightened by it." *Id.* at 147. The decision to restrict adult businesses to a specific

area did not oblige the city, in turn, to provide commercially desirable land. *Id.* This decision conflicts with *Woodall* because the Fourth Circuit properly refused to consider physical and economic characteristics of the land in the "C-9" zone as a basis to affirm the district court's judgment.

D. There is a Need for Supreme Court Guidance.

The issue presented in the Petition herein is important to the public. The issue is not merely academic nor one which will recur infrequently. The lower federal and state courts need guidance from the Supreme Court concerning the factors which are relevant for determining whether ordinances such as that involved in the instant case leave constitutionally sufficient alternative avenues of communication.

In *Woodall*, the Fifth Circuit held that physical and legal characteristics of land must be considered on the issue of availability of alternative avenues of communication. The court recognized that the "line between legal and physical impracticalities and economic impracticalities is thin," 950 F.2d at 261 n. 5, and that "[t]he standard for determining when land is economically unsuitable as an alternative avenue of communication remains *obscure*,"[1] *id.* (emphasis added).

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[1] The court's observation concerning the obscurity of the issue before it is contained in the portion of the court's opinion which was withdrawn upon rehearing. See *Woodall v. City of El Paso*, 959 F.2d 1305, 1306 (5th Cir. 1992). However, the court's recognition that Supreme Court guidance is lacking concerning the constitutional significance, if any, of legal and physical impracticalities is no doubt true.

The issue remains obscure, and is likely to lead to confusion and inconsistent results in other cases, because of two sweeping statements of the Supreme Court which are arguably inconsistent. In both *Young* and *Renton* the Supreme Court stated that "[t]he inquiry for First Amendment purposes is not concerned with economic impact." *Young*, 425 U.S. at 78 (Powell, J., concurring), *Renton*, 475 U.S. at 54. At the same time, in *Renton* the Court observed that the First Amendment requires cities to "refrain from *effectively* denying [adult businesses] a reasonable opportunity to open and operate," *Renton*, 475 U.S. at 54 (emphasis added). The word "effectively" can be misconstrued, as your amicus suggests it was by the Fifth Circuit in *Woodall*, as creating a qualification to this Court's statements in *Young* and *Renton* that economic impact is not constitutionally significant. NIMLO requests that this Court remove any doubts about how the *Renton* and *Young* decisions should be read when applied to factual situations such as those found in *Woodall*.

CONCLUSION

For all of the foregoing reasons it is urged that the Court grant a writ of certiorari and reverse the decision of the United States Court of Appeals for the Fifth Circuit.

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No. 92-110

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF EL PASO,

Petitioner,

v.

PHYLLIS WOODALL, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether land that is impossible to build on because of its physical characteristics, unavailable because of restrictive covenants or deed restrictions, or requires costly area wide road and utility improvements in order to locate a small retail business should be considered unavailable for purposes of determining if there are sufficient alternative locations to avoid suppressing access to protected speech?

2. Whether recently established precedent for determining the validity of place restrictions on businesses offering sexually oriented press materials should be reexamined or overruled when the test developed by those cases appears workable and understandable?

LIST OF PARTIES

These Respondents rely upon the list of parties as set forth in the Petition For Writ of Certiorari

Respondents, Jedjo, Inc. and SMD Enterprises, Inc., have no parent or subsidiary companies to be listed.

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No. 92-110

In The

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THE CITY OF EL PASO,

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PHYLLIS WOODALL, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the Petition For Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Fifth Circuit entered in *Woodall v. City of El Paso,* 950 F.2d 255 (5th Cir. 1992), and as modified in *Woodall v. City of El Paso,* 959 F.2d 1305 (5th Cir. 1992).

OPINIONS BELOW

Respondents rely upon Petitioner's recitation of the opinions below.

STATEMENT OF CASE

The following additional facts are necessary to an appreciation of the reasons why the Writ should be denied.

The Respondents operate retail adult businesses within the City of El Paso. The businesses include topless bars, topless and nude clubs, adult bookstores, and adult movie theatres.[1] The City stipulated that the business activities of the Respondents involve speech that is protected by the First Amendment to the United States Constitution. T. 640.[2]

By early 1988, the City of El Paso had enacted a series of ever more restrictive zoning ordinances regulating the location of adult businesses. In March, 1988, there were 39 adult businesses in existence in the City of El Paso. T. 193, 200-01. As a consequence of these ordinances, all 39 adult businesses were illegal and will be required to close. T. 428.

The City of El Paso has a population of 526,380. T. 920. It encompasses 247 square miles and consists of approximately 158,000 acres. T. 172. Of the total acreage available in the C-4 and C-5 zones where adult businesses are allowed to locate, approximately 50% is not available because of the 1,000 foot setback requirement from

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[1] Each of these uses is defined in the ordinances. See Petition For Writ Of Certiorari, Appendix F, pages 39a-40a, and Appendix G, Pages 44a-45a. For purposes of convenience, they will be referred to throughout as "adult businesses."

[2] The abbreviation "T" refers to the Transcript of Proceedings.

churches, schools, residences, and other protected uses. T. 186. This leaves approximately 1,433 acres which are potentially available for use by adult businesses.[3] T. 172. This represents approximately nine tenths of one percent (.009) of the entire acreage of the City of El Paso. T. 420.

Of the potentially available acres, a substantial portion has nothing on it. T. 188. There are only 600 acres of potentially available land that have buildings, streets and utilities. T. 420. This built out or developable acreage comprises .0037 percent of the total acreage of the City.[4] T. 421.

In preparing the ordinances, no one in the Planning Department attempted to determine the impact of the 1,000 foot setback requirement on adult businesses. T. 191-92. Nothing was done to ensure that a reasonable balance was maintained between the First Amendment rights of adult businesses and the zoning requirements of the City. T. 192, 195-96. Even after passage of the ordinances, no one knew whether the ordinances would

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[3] The total number of available acres is of no relevant consequence because of the 72-acre buffer zone created by the 1,000 foot separation requirement between adult businesses.

[4] The facts here should be contrasted with the facts existing in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) where the Court found ample alternative channels of communication. The available land area allowed by Renton for adult theatres consisted of more than 5% of the entire land area of the City. 475 U.S. 52. Within this area, there was no dispersion requirement. The set aside area would accommodate well over 400 theatres and surrounding parking lots. Brief of Appellant, City of Renton, page 31.

entirely exclude adult businesses from doing business within the City. T. 196.

In making its calculation of potentially available acreage, the City did not exclude property that was totally unusable for any commercial business purpose because of sink holes, ponding areas, gullies, sheer walls, or other topographical or physical impediments to building. The City simply identified land area. T. 280-81, 292, 358. No attention was paid to whether there was street access to an area. T. 361. Finally, no area was eliminated because of the impracticality or extraordinary cost of building on any of the potential sites, particularly those that might be landlocked or a great distance from the nearest access road with available utilities.[5] The standard used by the City to determine whether a location was "reasonable" was whether it complied with the requirements of the ordinance. T. 452.

Ponding areas that were identified by the City as being available are, as a practical matter, totally unavailable to any business activity because the City will not allow construction of any buildings in these areas. T. 280-83.

In addition to being physically unsuitable or unavailable for use by any small retail business, much of the land the City claims as being available is subject to restrictive covenants and other deed restrictions that prohibit its use

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[5] Respondents are owners and operators of small retail businesses. It is not reasonable to require that they be developers of large malls or capable of financing area-wide improvements, such as roads, sewers, and electrical services, in order to secure a location.

by adult businesses.[6] In preparing the ordinance, the City paid no attention to restrictive covenants or deed restrictions that applied to areas where adult businesses are allowed to locate. T. 221, 291-92.

Some restrictive covenants prohibit adult businesses as a permitted use, T. 862-64, or prohibit uses not generally considered appropriate for regional shopping centers.[7] Other restrictive covenants prohibit all retail uses.[8] Land owned by the City at the El Paso International Airport is subject to what are known as "permitted uses." These operate in the same manner as restrictive covenants, but in reverse. They specify permissible uses. All other uses are prohibited. T. 855. Adult businesses are not a "permitted use" in the airport area. T. 857.

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[6] Justice Douglas, in *Reitman v. Mulkey*, 387 U.S. 369, 384-85 (1967) (Douglas, J. concurring), noted that restrictive covenants constitute a restraint on property that, in reality, has the equivalent effect of state and municipal zoning laws. Such covenants can accomplish the same effect as a statute, thus leaving the objective to be accomplished by a system of private contracts, enforced by the State. The effect of restrictive covenants on available area cannot be ignored. To do so would allow cities to do indirectly that which they cannot do directly.

[7] Testimony at trial established that adult businesses would not be an appropriate use for a regional shopping center and would be obviously against the purpose of the deed restriction. T. 851-53.

[8] Retail uses are prohibited unless the retail use constitutes no more than ten percent of gross building area and sales consist solely of goods or products manufactured or produced on the premises or incidental retail sales of other goods and products warehoused on the premises. T. 866.

It is in the context of these facts that the Fifth Circuit found the trial courts instructions to the jury inadequate.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FIFTH CIRCUIT IS A FAITHFUL APPLICATION OF THE TEACHINGS OF *CITY OF RENTON V. PLAYTIME THEATRES, INC.*, BASED UPON THE UNIQUE CHARACTERISTICS OF THE AVAILABLE LAND AREAS IN THE CITY OF EL PASO, AND DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

A. *YOUNG* AND *RENTON* REQUIRE THAT PLACE RESTRICTIONS ON PROTECTED SPEECH LEAVE REASONABLE ALTERNATIVE LOCATIONS.

Over the past fifteen years, this Court has fashioned a test for determining the validity of place regulations on adult businesses. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Court found valid a regulation that dispersed adult theatres 1,000 feet from any two other regulated uses and prohibited such theatres from locating within 500 feet of a residential area. In making its determination, the Court noted that there was no claim that distributors or exhibitors were denied access to the market. 427 U.S. 62. Justice Stevens, writing for four members of the Court, indicated that the situation would be quite different if the ordinance had the effect of suppressing or greatly restricting access to lawful speech. 427 U.S. 71, n.35. Implicit in *Young* was the conclusion that a zoning ordinance "that does not reduce significantly the number

or accessibility of theaters presenting particular films, stifles no expression." *Young*, at 81, n.4 (Powell, J., concurring).

More recently, the Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986), while cautioning against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to lawful speech," held that the First Amendment requires only that a city refrain from "effectively denying . . . a reasonable opportunity to open and operate . . . within the city . . . " It explained this by saying that adult businesses " . . . must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees . . . " *Id.* In concrete terms, this means that cities must not unreasonably limit alternative avenues of communication.[9]

The Fifth Circuit faithfully applied *Young* and *Renton* in concluding that the instructions given to the jury by the trial court did not adequately inform the jury that alternative avenues of communication cannot be found to

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[9] Petitioner erroneously asserts that *Renton* stands for the proposition that "reasonable alternatives" includes land that is physically and legally unsuitable, and not available for sale or lease in the marketplace. Pet., page 15. Moreover, Petitioner asserts that it should bear no burden of ascertaining the effect such land would have on access to protected speech. Pet., pages 19-20. Respondents submit that if Cities voluntarily undertake to impose time, place or manner restrictions on speech protected businesses, they have the concomitant minimal duty to determine the potential effect of those regulations on speech in order to insure that the regulations do not have "the effect of suppressing, or greatly restricting access to lawful speech." *Renton*, 475 U.S. 54.

be reasonably available if the physical or legal characteristics of the alleged alternatives make it impossible for any adult business to locate there. It determined that the instruction given did not provide sufficient guidance to allow the jury to answer the central question of the "time, place or manner" test, i.e., are the alternatives actually available sufficient to avoid suppressing access to protected speech?

The decision of the Fifth Circuit does nothing more than state the obvious: (1) if land is physically unsuited for any kind of development because of its topographical or physical characteristics, it is not reasonable to expect businesses, including adult businesses, to locate there or alternatively be denied access to the marketplace; (2) if land is legally not available to retail businesses, including adult businesses, it should not be considered part of the real estate market where adult businesses are required to compete, on an equal footing, with other purchasers and lessees of commercial retail space; and (3) it is unreasonable to require small retailers, such as adult businesses, to become area-wide developers required to install streets and utilities, costing many millions of dollars, in order to secure a location for their businesses.

Renton requires that cities make available ample reasonable alternative avenues of communication if they choose to regulate the location of adult businesses. The opinion of the Fifth Circuit is fully consistent with that direction. It simply requires that the trial court instruct the jury that if land is, in actuality, unavailable for any commercial use, it should not be considered in determining whether ample alternatives exist.

B. THE FIFTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The narrow holding of the Fifth Circuit is not in conflict with the decisions cited by Petitioner.

In *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991), the Court examined the record and found 120 potentially available locations. Noting that other adult businesses had been able to find suitable relocation sites, the Court Of Appeals found the economic argument that available locations were economically unfeasible, or not for sale or lease, unpersuasive. Here, the Court retracted its opinion regarding economic feasibility and decided only that the jury was improperly instructed in how to determine if there were ample reasonable alternatives.

In *International Food & Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986), the Court did little more than remand the case back to the trial court for further consideration in light of this Court's decision in *Renton* and the trial court's failure to make any finding as to how many sites were available in addition to existing nonconforming uses.[10] The Court did note, however, that *Renton* requires, at a minimum, a "physically adequate

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[10] The Petitioner erroneously asserts that the Court "upheld" the ordinance in *International Food & Beverage Systems v. City of Fort Lauderdale*. Pet., page 17. In vacating the decision of the district court, the Court said: "We think that remand to reconsider and retry in light of the *Renton* case is the most appropriate measure for us to take." 794 F.2d 1527.

forum," 794 F.2d 1526, a holding completely consistent with the decision of the Fifth Circuit.

The Fifth Circuit merely held that the jury was improperly instructed with respect to what land could be considered constitutionally available in order to determine if there were, in fact, reasonable alternative avenues of communication. In each of the relevant decisions relied upon by Petitioner, the Court found evidence in the record to establish that adequate alternative locations were available or that the economic profitability of available and suitable locations was not a proper issue for consideration. See also, *FW/PBS v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988) and *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988).

II. THE ISSUE OF WHETHER THE REGULATION OF ADULT BUSINESSES THROUGH ZONING ORDINANCES INVOKES CONSTITUTIONAL SCRUTINY WAS NOT CONSIDERED OR DECIDED BELOW AND IS AN ISSUE THAT HAS BEEN RECENTLY AND AUTHORITATIVELY RESOLVED BY THIS COURT TO REQUIRE USE OF THE "TIME, PLACE OR MANNER" TEST, PARTICULARLY WHERE PURE SPEECH IS INVOLVED.

A. THIS COURT SHOULD NOT CONSIDER ISSUES NOT DECIDED BELOW.

The simple issue below was whether the El Paso zoning ordinances, which regulate the location of adult businesses, provide reasonable alternative avenues of communication. The City stipulated that the business activities of all of the Respondents involve speech that is protected by the First Amendment. T. 640. In addition,

the City stipulated that the constitutionality of the ordinances should be measured by the time, place or manner test developed in *Renton*. Brief For Appellee City Of El Paso, (filed in the Court below), pages 8-9.

The Petitioner has now invited this Court to decide the broader question of whether zoning ordinances regulating the location of adult businesses continue to invoke constitutional scrutiny in light of the Court's decision in *Barnes v. Glen Theatres, Inc.*, 111 S.Ct. 2456 (1991). This issue was not raised to the trial court, nor was it raised in the Fifth Circuit until the filing of Petitioner's Petition For Panel Rehearing. The Fifth Circuit declined to comment on the issue in its Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

Generally, this Court will not decide questions which have not been passed upon by the Court of Appeals. *United States v. Fleischman*, 339 U.S. 349, 365 (1950). It sits as a court of review and only in exceptional cases will it review questions not raised in the courts below. *Duigan v. United States*, 274 U.S. 195, 200 (1927). See also *Lawn v. United States*, 355 U.S. 339, 362, n.16 (1958). There are no exceptional circumstances here to justify disregarding this practice.

B. THE EL PASO ZONING ORDINANCES REGULATE PURE SPEECH AND ARE THEREFORE NOT SUBJECT TO THE SAME ANALYSIS UTILIZED BY THE PLURALITY IN *BARNES v. GLEN THEATRE, INC.*

The uses subject to the controls of the El Paso zoning ordinances include adult bookstores, adult motion picture theatres and nude live entertainment clubs.

It is beyond ingenious dispute that books and magazines sold at adult bookstores are presumptively entitled to the full protection of the First Amendment. Similarly, motion picture films exhibited at adult theatres enjoy the same degree of protection. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952).

With respect to live nude entertainment clubs, this Court has often held that entertainment enjoys First Amendment protection. *Winters v. New York,* 338 U.S. 507, 510 (1947); *Zacchini v. Scripps-Howard Broadcasting Company,* 433 U.S. 562, 578 (1977). In addition, this Court has repeatedly implicitly found nude dancing, as entertainment, to be within the penumbra of the First Amendment. *See,* among others, *California v. LaRue,* 409 U.S. 109 (1972); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932-933 (1975); and *Shad v. Borough of Mount Ephraim,* 452 U.S. 61, 65-66 (1981).

Most recently this Court had occasion to consider directly whether nude dancing is speech protected by the First Amendment. In *Barnes v. Glen Theatre, Inc.,* supra, eight justices found that nude dancing is expressive conduct which enjoys First Amendment protection.

The issue in *Barnes* was the level of protection to be afforded the expressive conduct at issue, and a determination of whether the statute was an impermissible infringement of protected activity. 111 S.Ct. 2460. The Court turned to *United States v. O'Brien*, 391 U.S. 367 (1968) for guidance. There, this Court had previously held that expressive conduct could be narrowly regulated or forbidden in pursuit of an important or substantial governmental interest that is unrelated to the content of the expression regulated.

> . . . when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitation on First Amendment freedoms. Id., at 376-377, 88 S.Ct., at 1678-1679.

While the result of the Court's decision in *Barnes* was to uphold a statute of general application prohibiting all public nudity, the analysis employed by the Court recognized the important and fundamental First Amendment concerns involved and carefully scrutinized the ordinance to insure no constitutional violation.

Here, the zoning ordinances at issue regulate much more than the expressive conduct described in *Barnes;* they regulate pure speech in the form of books and magazines sold at adult bookstores and motion picture presentations at adult motion picture theatres.[11] This difference makes the "expressive conduct" analysis of the

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[11] Petitioner misstates the nature and effect of the zoning ordinances at issue by suggesting that their reach is no different than the public nudity proscribed by the statute in *Barnes*. Pet., page 22. Petitioner ignores the clear reach of the ordinances to

Court in *Barnes* inapplicable to the ordinances here.[12] Where pure speech is involved, the Court must employ the time, place or manner test developed for evaluating restrictions on speech protected activity.[13]

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books, magazines and motion pictures.

[12] In *World Wide Video v. Tukwila*, 117 Wn.2d 382, 388, 816 P.2d 18 (1991), *cert. denied*, 112 S.Ct. 1672 (1992), the Washington State Supreme Court, faced with the same question, said:

> . . . the written or filmed materials distributed by WWV are "pure" speech for the purposes of the First Amendment. By its own terms, the *Barnes* decision does not apply to "pure" speech; thus *Renton* remains the appropriate starting point for cases of this type.

[13] In *Barnes*, 111 S.Ct. 2465-66, Justice Scalia stood alone in his determination that the statute did not implicate the First Amendment. However, he carefully pointed out that his view was limited to "expressive conduct" and that pure speech was entitled to the full protection of the First Amendment.

> When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance, to reduce noise, see *Saia v. New York*, 334 U.S. 558, 561 (1948), to regulate election campaigns, see *Buckley v. Valeo*, 424 U.S. 1, 16 (1976), to prevent littering, see *Schneider v. State*, 308 U.S. 147, 163 (1939)), we insist that it meet the high, First-Amendment standard of justification.

C. NO FACTS OR CIRCUMSTANCES EXIST TO JUSTIFY IGNORING ESTABLISHED PRECEDENT FOR DETERMINING THE VALIDITY OF TIME, PLACE OR MANNER RESTRICTIONS PLACED UPON BUSINESSES DEALING IN SEXUALLY ORIENTED SPEECH MATERIALS PROTECTED BY THE FIRST AMENDMENT.

Beginning with *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), this Court held that adult businesses that cause secondary effects upon the surrounding community do not have talismanic immunity from zoning laws that seek to regulate their location so long as the regulation is aimed at curing the evils caused by the business activity, and not at the content of the speech itself. Ten years later, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court utilized the "time, place or manner" test developed for evaluating restrictions on expression taking place on public property to find a City of Renton zoning ordinance regulating the location of adult theatres constitutional. *Renton* requires that content neutral adult entertainment zoning ordinances must serve a substantial governmental interest and allow for reasonable alternative channels of communication. 475 U.S. 49, 50.

In order to be upheld, time, place or manner restrictions must also be "narrowly tailored" to achieve the articulated governmental interest. *Clark v. Community of Creative Non-Violence*, 468 U.S. 288, 293 (1984). This same principle was applied in *Renton*. There, this Court said:

> Moreover, the Renton ordinance is "narrowly tailored" to affect only the category of theaters

> shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Shad v. Mount Ephraim*, 452 U.S. 61 (1981) and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

475 U.S. 52.

Since *Renton*, the method of analysis developed there has been employed again and again by state and federal courts to pass upon the validity of municipal zoning ordinances which regulate the location of adult businesses. For example, see *SDJ, Inc. v. City of Houston*, 837 F.2d 219 (5th Cir. 1988); *Tollis, Inc. v. San Bernardino*, 827 F.2d 1329 (9th Cir. 1987); *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1258 (5th Cir. 1988); *Alexander v. City of Minneapolis*, 928 F.2d 278 (7th Cir. 1991); *North End Cinema, Inc. v. Seattle*, 90 Wn.2d 209, 585 P.2d 1153 (1978); *People v. Superior Court (Lucero)*, 259 Cal. Rptr. 740 (1989); *World Wide Video v. City of Tukwila*, 117 Wn.2d 382, 816 P.2d 19 (1991), *cert. denied*, 112 S.Ct. 1672 (1992).[14]

Respondents submit that none of circumstances which may prompt this Court to overrule its established precedent exist so as to justify abandoning the methodology of *Young* and *Renton*.

In *Casey v. Pennsylvania*, 112 S.Ct. 2791 (1992), this Court discussed and reviewed the circumstances under which it will abandon or overrule established precedent.

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[14] The forgoing list of citations is not meant to be exhaustive. The citations are merely representative of the many state and federal cases that have utilized, without difficulty, the *Renton* analysis.

> . . . . when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability . . . ; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . . ; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . . ; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification . . . (citations omitted).

1992 WL 142546, *13 (U.S.)

A review of the many post *Renton* decisions establishes that the test of *Renton* has not been found "unworkable," "a doctrinal anachronism discounted by society," or "irrelevant or unjustifiable" in dealing with the issue of regulating speech protected activities. 1992 WL 142546, *14 (U.S.). Rather, the many courts that have dealt with the issue have had no difficulty understanding and applying the test. Equally as important, the cases demonstrate that, in most instances, municipalities have had no difficulty understanding and meeting the minimal burdens imposed by the test to insure that protected speech is not unreasonably or unnecessarily burdened.

Petitioner has offered no justifiable basis for reexamining or overruling *Young* and *Renton*, and the Court should decline its invitation to do so.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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